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Supreme Court of the United States

OCTOBER TERM, 1990

MCORP, MCORP FINANCIAL, INC.
and MCORP MANAGEMENT

— and —

OFFICIAL CREDITORS' COMMITTEE OF MCORP, MCORP FINANCIAL, INC. AND MCORP MANAGEMENT,

Joint Petitioners,

— against —

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fifth Circuit err in holding that the anti-injunction provision of the Financial Institutions Supervisory Act of 1966, 12 U.S.C. § 1818(i), divests the district court, in its capacity as a bankruptcy court, of jurisdiction under 28 U.S.C. § 1334 to affect by injunction or otherwise the prosecution by the Board of Governors of the Federal Reserve System of an administrative enforcement proceeding affecting the disposition of the assets of a bank holding company which is a debtor in a case under chapter 11 of the Bankruptcy Code?

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PETITION FOR WRIT OF CERTIORARI

MCorp, MCorp Financial, Inc. and MCorp Management (collectively, the "Debtors")[1] and the Official Creditors' Committee of MCorp, MCorp Financial, Inc. and MCorp Management (the "Creditors' Committee" and, together with the Debtors, the "Petitioners") respectfully request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit").

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas, Houston Division (the "District Court"), preliminarily enjoining The Board of Governors of the Federal Reserve System of the United States (the "Board") from prosecuting certain administrative proceedings against the Debtors, is reported at 101 B.R. 483 and is reprinted as Appendix A. The District Court's preliminary injunction (the "Preliminary Injunction") is reprinted as Appendix B. The decision of the Fifth Circuit, affirming in part and reversing in part the District Court's decision, is reported at 900 F.2d 852 and is reprinted as Appendix C. The Fifth Circuit's order on rehearing is reported at 911 F.2d 730 and is reprinted as Appendix D.

JURISDICTION

The judgment of the Fifth Circuit became final on August 6, 1990 after the court denied the Board's petition for rehearing and the Petitioners' and the Board's suggestions for rehearing *en banc*. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

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1. MCorp is the parent company of both MCorp Financial, Inc. and MCorp Management. MCorp, MCorp Financial, Inc. and MCorp Management have no subsidiaries other than wholly owned subsidiaries of such corporations.

STATUTORY PROVISIONS INVOLVED

This case involves section 101 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. § 1334; section 101 of the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 105 and 362; and section 8 of the Financial Institutions Supervisory Act of 1966 ("FISA"), 12 U.S.C. § 1818. The pertinent portions of these provisions are reprinted as Appendix E.

STATEMENT OF THE CASE

This case arises out of administrative enforcement proceedings commenced by the Board against MCorp and MCorp Management after the cessation of efforts to effect a recapitalization of MCorp and its subsidiaries, the seizure of twenty of MCorp's national bank subsidiaries by the Office of the Comptroller of the Currency (the "Comptroller") and the commencement of a case against MCorp under chapter 7 of title 11 of the United States Code (the "Bankruptcy Code") on March 21, 1989. On March 30, 1989, two days after the seizure of MCorp's banks, including MBank Houston, N.A. and MBank Dallas, N.A., the Board issued a notice of charges (the "March Notice of Charges") alleging that MCorp and MCorp Management had violated section 23A of the Federal Reserve Act, 12 U.S.C. § 371c, by causing MBank Houston and a predecessor to MBank Dallas to enter into certain transactions in December 1986. On April 19, 1989, MCorp and MCorp Management filed an answer to the March Notice of Charges challenging the authority of the Board to bring the administrative proceeding commenced thereby (the "23A Proceeding") and denying the legal and factual bases of the charges. Thereafter, an administrative law judge selected by the Board scheduled a hearing on the March Notice of Charges for May 29, 1989.

By Complaint and Emergency Motion, each dated May 2, 1989, the Debtors commenced an adversary proceeding (the "Adversary Proceeding") in the United States Bankruptcy Court for the Southern District of Texas, Houston Division (the

"Bankruptcy Court"), in which court the Debtors' chapter 11 cases were pending, to enjoin the Board from prosecuting, among other things, the 23A Proceeding.[2] The Creditors' Committee, which was appointed and is a party in interest in the Debtors' chapter 11 cases pursuant to sections 1102 and 1109 of the Bankruptcy Code, intervened in the Adversary Proceeding to support the Emergency Motion. After hearings held on June 2 and 3, 1989, the District Court[3] granted the Emergency Motion and entered the Preliminary Injunction.

On May 15, 1990, a three-member panel of the Fifth Circuit reversed and vacated that portion of the Preliminary Injunction relating to the 23A Proceeding and remanded the case to the District Court. On June 28, 1990, the Petitioners filed a joint suggestion for rehearing *en banc* with respect to that aspect of the Fifth Circuit's decision. On August 6, 1990, the Fifth Circuit denied the Petitioners' joint suggestion for rehearing *en banc*.

A. *Statement of Facts*

In the Spring of 1988, MCorp commenced discussions with, among others, the Federal Deposit Insurance Corporation (the "FDIC"), the Comptroller and the Board (collectively, the "Regulators") in an effort to develop a comprehensive recapitalization plan for MCorp and its twenty-five MBank national bank subsidiaries (the "MBanks"). Towards this end, and after discussions with the Regulators proved fruitless, MCorp submitted a formal proposal to the FDIC on October 7, 1988 which contemplated a global recapitalization and restructuring of the MCorp enterprise, including the infusion of substantial private capital and FDIC open bank assistance for the MBanks.

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2. The Adversary Proceeding also sought to enjoin the Board from prosecuting other administrative proceedings based upon the Board's self-proclaimed "Source of Strength" doctrine. The Fifth Circuit determined that no legal basis existed for the Board's source of strength proceedings. Appendix C at C-13—C-21.

3. On May 11, 1989, on the motion of the Board, and without opposition from the Debtors, the District Court entered an order withdrawing the reference of the Adversary Proceeding pursuant to 28 U.S.C. § 157(d).

Despite MCorp's commitment to make all of its liquid assets available in such a restructuring, the Regulators insisted that MCorp first infuse all of its available assets into the MBanks as the *sine qua non* to opening negotiations for FDIC open bank assistance. That action would have required MCorp to disregard the legitimate interests of its creditors and stockholders, who were dependent on those assets for payment of the debts owed by the Debtors and the future success of the Debtors.[4] Based on the financial condition of the MBanks, such action would have inured solely to the benefit of the FDIC. When MCorp refused to acquiesce in the Regulators' demands, the Regulators embarked on a carefully orchestrated scheme to strip MCorp of its liquid assets before closing and seizing the MBanks and their assets.

1. *The October Administrative Proceedings*

As part of that effort, on October 19, 1988 and October 26, 1988, the Board commenced an administrative proceeding and issued three temporary cease and desist orders (the "October Proceedings") against MCorp alleging that MCorp was engaging in "unsafe and unsound banking practices" by refusing immediately to contribute its limited capital to the troubled MBanks. These administrative proceedings were based upon the Board's self-proclaimed "Source of Strength" doctrine, pursuant to which the Board attempted to cloak itself with authority to compel bank holding companies to infuse unlimited capital into subsidiary banks.[5]

2. *The Seizure of the MBanks and the Filing of the Chapter 11 Cases*

Despite the commencement of the October Proceedings, MCorp refused to "downstream" its assets to any of the MBanks except as part of a global recapitalization of the MCorp enterprise. On November 6, 1988, MCorp reached "standstill" agreements

4. In fact, several MCorp creditors either threatened or initiated legal action against MCorp and its board of directors to enjoin such actions.

5. The Fifth Circuit, in this case, held that the "Source of Strength" doctrine exceeds the statutory authority of the Board. *See* Appendix C at C-13—C-21.

with the Regulators. The parties agreed to hold in abeyance the October Proceedings and certain other administrative notices issued by the Comptroller to certain of the MBanks. The FDIC promised to consider during the following ten weeks MCorp's October 7, 1988 proposal, while at the same time undertaking to entertain proposals from third parties relating to the MBanks. MCorp agreed to cooperate in the evaluation process.

Despite MCorp's good faith compliance with the standstill agreements, the FDIC did not complete its "evaluation" process by the January 1989 deadline set in the agreements. On March 21, 1989, three small MCorp creditors lost patience and filed an involuntary petition for relief under chapter 7 of the Bankruptcy Code against MCorp.

On March 28, 1989, only two days after learning from MCorp of the filing of the involuntary petition, the FDIC, without notice to or discussion with MCorp, rejected MCorp's proposed global recapitalization. As described by the Board, "[t]he FDIC's decision set in motion a chain of events culminating in the insolvency" of twenty of the twenty-five MBanks (the "Closed MBanks"). Brief of Defendant-Appellant before the United States Court of Appeals for the Fifth Circuit, at 7-8 (the "Board Brief"). Conceding that it acted in concert with the Comptroller and the FDIC, the Board took the extraordinary step of demanding repayment by MBank Dallas of its $1.4 billion of fully secured borrowings from the Federal Reserve Bank in Dallas. When MBank Dallas failed to repay such borrowings on demand, the Comptroller declared MBank Dallas insolvent, thus triggering the alleged insolvency and closing of twelve otherwise solvent MBanks before the banks opened for business on March 29, 1989. After declaring the Closed MBanks insolvent, the Comptroller revoked their charters, appointed the FDIC as receiver of the banks, and transferred almost all of their assets to a "bridge bank" owned by the FDIC.[6] As a consequence, the Closed MBanks ceased to exist.

6. In another case arising out of the seizure of the MBanks, the United States District Court for the Northern District of Texas held that certain of the FDIC's actions

On March 31, 1989, MCorp, MCorp Financial and MCorp Management sought protection under chapter 11 of the Bankruptcy Code. The Debtors are continuing to operate their remaining businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. Since the commencement of the chapter 11 cases, the Debtors have sought or obtained orders authorizing them to sell most of their five remaining MBanks.

3. *The 23A Proceeding*

Less than ten days after the involuntary bankruptcy petition was filed against MCorp and two days after the Comptroller seized the Closed MBanks, the Board issued the March Notice of Charges initiating the 23A Proceeding. The March Notice of Charges alleged that MCorp and MCorp Management had violated section 23A of the Federal Reserve Act by causing two of the Closed MBanks, MBank Houston and a predecessor to MBank Dallas, unlawfully to extend unsecured credit to certain of their non-bank affiliates in December 1986.

Initiated after repeated examinations by bank examiners and regulators had failed to find that section 23A had been violated, the Board's 23A Proceeding seeks to compel MCorp and MCorp Management to account for and pay to the FDIC, as receiver of MBank Houston and MBank Dallas, disputed *prepetition* claims arising out of transactions that occurred more than two years prior to the seizure of the Closed MBanks and the Debtors' chapter 11 cases.[7] The 23A Proceeding plainly is not a legitimate effort to enforce the Board's regulatory functions, because, among

on March 28 and 29 violated the National Bank Act. *MBank New Braunfels, N.A. v. FDIC*, 721 F. Supp. 120 (N.D. Tex. 1989) (Porter, D.J.); *see also Texas American Bancshares, Inc. v. Clarke*, 740 F. Supp. 1243 (N.D. Tex. 1990) (Sanders, D.J.) (holding that certain actions by the Comptroller in seizing another Texas bank holding company's solvent banks in circumstances remarkably similar to those of the instant case violated the National Bank Act). The actions of the comptroller in the instant case are also the subject of litigation by MCorp in the United States District Court for the Northern District of Texas.

7. The Board has conceded that the 23A Proceeding seeks to remedy previous violations of the statute by enforcement of a restitutionary order. *See* Reply Brief of Defendant-Appellant before the Fifth Circuit, at p. 5.

other things, it involves two Closed MBanks that are no longer controlled by MCorp and with respect to which MCorp is not a bank holding company. Further, MCorp has repeatedly acknowledged that they are obligated to and will comply with all applicable laws and regulations governing the postpetition operation of their businesses, including their remaining MBank subsidiaries.

Instead, the 23A Proceeding is a transparent attempt to sidestep the jurisdiction of the Bankruptcy Court over the Debtors' chapter 11 cases and property in order to assist the FDIC, as receiver for MBank Houston and MBank Dallas, in collecting an alleged prepetition claim in preference to the Debtors' other creditors. This is demonstrated by the fact that on September 11, 1989 the FDIC, as receiver, filed a proof of claim in the Debtors' chapter 11 cases seeking to recover for the same alleged unsecured credit extensions that are the subject of the Board's 23A Proceeding. On June 26, 1990, the Debtors filed an objection to the FDIC's claim, including that portion of the FDIC's claim relating to the 1986 transactions. As a consequence, the claim is now pending before the District Court and will be heard and determined by the District Court[8] in accordance with section 502 of the Bankruptcy Code pursuant to its jurisdiction under 28 U.S.C. § 1334.

4. *The May Administrative Proceeding*

On May 24, 1989, one week before the scheduled hearing before the District Court on the Emergency Motion, and without prior notice, the Board issued an "amended" notice of charges initiating yet another postpetition administrative proceeding against MCorp (the "May Proceeding").[9] In the May Proceeding, the Board sought to enforce its "Source of Strength" doctrine by requiring MCorp to contribute assets to three of its five remaining MBanks. Ironically, at the time the Board commenced the May

8. By order dated September 7, 1990, on motion by the Debtors, the District Court withdrew the reference of the FDIC's claim pursuant to 28 U.S.C. § 157(d).

9. The October and May Proceedings are collectively referred to herein as the "Source of Strength Proceedings." The 23A Proceeding and the Source of Strength Proceedings are collectively referred to herein as the "Administrative Proceedings".

Proceeding, the Debtors and the five remaining MBanks were working with the Comptroller, the primary regulator of the MBanks, to develop a plan to enhance the capital of the remaining MBanks.[10]

B. *Proceedings Below*

On May 2, 1989, in response to the Board's prosecution of the 23A Proceeding and threat of continued prosecution of the October Source of Strength Proceedings, the Debtors commenced the Adversary Proceeding in the Bankruptcy Court seeking injunctive relief against the Board pursuant to sections 105(a) and 362 of the Bankruptcy Code. The jurisdiction of the Bankruptcy Court was invoked pursuant to 28 U.S.C. §§ 157(a) and 1334. On motion of the Board, and without opposition from the Debtors, the District Court withdrew the reference of the Adversary Proceeding pursuant to 28 U.S.C. § 157(d).

On June 2 and 3, 1989, the District Court held hearings at which the Board offered no evidence. On June 5, 1989, the District Court entered the Preliminary Injunction granting the relief sought by the Debtors.[11] In addition to enjoining the Board's pending Administrative Proceedings, including the May Proceeding, the District Court enjoined the Board

> from using its authority over bank holding companies or banks to attempt to effect, directly or indirectly, a reorganization of the MCorp group or its components or to interfere, except through participation in the bankruptcy proceedings, with the restructuring being developed in the bankruptcy proceeding.

Preliminary Injunction, Appendix B at B-4. The District Court specified that the Preliminary Injunction left completely unaffected

10. Despite the protection of the Preliminary Injunction which enjoined the May Proceeding, on June 30, 1989, the Debtors made a motion in the Bankruptcy Court for authority to infuse up to $18 million in capital into their remaining MBanks. The Bankruptcy Court granted that motion by order dated September 28, 1989.

11. The Preliminary Injunction entered by the District Court on June 5, 1989 was corrected, restated in full and reentered on June 23, 1989.

the Board's "general execution, supervisory and examination duties of the operations of MCorp and its bank subsidiaries and . . . central bank duties as they affect MCorp in common with all other institutions." Appendix B at B-3—B-4.

In issuing the Preliminary Injunction, the District Court specifically found that:

> (1) the Debtors are likely to prevail in establishing that (a) because the Board's administrative proceedings are "inextricably mixed with the restructuring process rather than some ancillary public health or safety question," such proceedings are subject to the automatic stay extant in the Debtors' chapter 11 cases pursuant to section 362 of the Bankruptcy Code and (b) "[t]he administrative actions will conflict with MCorp's ability to address a global reorganization in the bankruptcy case" and, accordingly, should be enjoined pursuant to section 105(a) of the Bankruptcy Code;
>
> (2) the Debtors will suffer imminent and irreparable harm to their reorganization efforts unless the Board is enjoined;
>
> (3) "[t]he risk to MCorp in both probability and magnitude exceeds the possible danger to the Board's interests," because the Board's interest in "healthy holding companies . . . can adequately be represented in the bankruptcy proceedings;" and
>
> (4) the public interest "is served by having all proceedings in one forum, especially a forum where the individuals and the affected public can participate."

Appendix A at A-4, A-5.

On July 26, 1989, the Board appealed the District Court's decision to the Fifth Circuit. On May 15, 1990, that court vacated the Preliminary Injunction insofar as it pertained to and enjoined the 23A Proceeding, but remanded the case to the District Court with instructions to enter an order enjoining the Board from further prosecution of source of strength proceedings against the Debtors.

With respect to the injunction against the 23A Proceeding, the Fifth Circuit held that the anti-injunction provision of FISA, 12 U.S.C. § 1818(i) (the "FISA Anti-Injunction Provision") divests the District Court of its jurisdiction under 28 U.S.C. § 1334, the provision governing the jurisdiction of the district courts, sitting in bankruptcy. The court held that section 1334(b), which grants the district court jurisdiction over all matters related to a bankruptcy case "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on [another] court," does not apply to Acts of Congress that confer exclusive jurisdiction on administrative agencies, including the FISA Anti-Injunction Provision. The Fifth Circuit further held that prosecution of the 23A Proceeding would not conflict with the District Court's exclusive jurisdiction over the Debtors' property based on its erroneous factual finding that the 23A Proceeding did not "directly concern the debtor's property." Appendix C at C-7. Accordingly, the Fifth Circuit vacated that portion of the Preliminary Injunction enjoining the Board from prosecuting the 23A Proceeding. The Fifth Circuit concluded, however, that in initiating the Source of Strength Proceedings the Board exceeded its statutory authority and, accordingly, remanded the case to the District Court with instructions to enjoin the Board from prosecuting source of strength proceedings against the Debtors.

This petition for a writ of certiorari pertains solely to the vacation of that portion of the Preliminary Injunction which enjoined the 23A Proceeding.

ARGUMENT

This case presents an issue of exceptional importance involving the interplay between the federal banking laws and the Bankruptcy Code and a conflict among the circuit courts of appeal on the jurisdiction of the bankruptcy courts in the face of anti-injunction statutes. Since the filing of MCorp's chapter 11 case, the economic downturn plaguing MCorp and other Texas bank holding companies has spread throughout the United States. Whipsawed by the demands of federal banking regulators that they infuse more capital into their troubled bank subsidiaries and the conflicting

demands of their own creditors and stockholders that they preserve the bank holding companies' assets for the benefit of creditors and stockholders, more and more bank holding companies have sought and will continue to seek protection under chapter 11 of the Bankruptcy Code.[12]

Chapter 11 cases of bank holding companies such as this one are rife with both actual and potential conflicts between the Bankruptcy Code and the federal banking laws.[13] On the one hand, Congress authorized the federal banking regulators to regulate the affairs of both banks and bank holding companies. On the other hand, in enacting chapter 11 of the Bankruptcy Code, Congress established a pervasive and all-encompassing scheme for reorganizing debtors and reconciling the conflicting interests of the holders of various claims against and interests in a debtor and its property, including the claims and interests of governmental units. In the context of a bank holding company chapter 11 case in which the debtor's principal assets are its banks, the authority of the federal banking regulators over the affairs of banking enterprises often overlaps with that of the Bankruptcy Court over the debtor and its estate.

In holding that the FISA Anti-Injunction Provision deprived the District Court of authority under section 1334 of title 28 and sections 105 and 362 of the Bankruptcy Code to enjoin the 23A Proceeding, the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. Furthermore, the Fifth Circuit's decision contravenes Congress' clear intent to bring all matters related to a bankruptcy case within the ambit of the bankruptcy courts

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12. In recognition of the existing insolvency provisions of the federal banking laws, banks may not be debtors under the Bankruptcy Code. *See* 11 U.S.C. § 109(b) & (d).

13. *See, e.g., In re American Continental Corp.*, Civ. No. 89-1231 PHX-RMB (D. Ariz., Oct. 30, 1989) (motion by Resolution Trust Corporation for dismissal of bankruptcy cases filed by non-bank subsidiaries of savings and loan association taken over by RTC denied) (copy attached as Appendix F); *In re Deltacorp, Inc.*, 111 B.R. 419 (Bankr. S.D.N.Y. 1990) (debtor-holding company's request for preliminary injunction preventing federal and state banking regulators from seizing savings and loan association denied).

(including district courts exercising bankruptcy jurisdiction) and to empower the bankruptcy courts to determine the proper balance between the potentially conflicting interests of creditors, stockholders and other parties in interest—including governmental agencies performing their statutory functions. The Fifth Circuit decision brings the Bankruptcy Code and the banking laws into direct and irreconcilable conflict.

The Fifth Circuit's decision also has a potential impact far beyond the Debtors' and other bank holding companies' chapter 11 cases, for it calls into question the ability of bankruptcy courts to enjoin actions not only of the Board, but of other administrative agencies as well. In this respect, the Fifth Circuit's decision that the FISA Anti-Injunction Provision overrides the jurisdictional provisions of the Bankruptcy Code conflicts with the decision of the Eighth Circuit that the anti-injunction provision of the Internal Revenue Code does *not* take precedence over the jurisdictional provisions of the Bankruptcy Code. *Bostwick* v. *United States*, 521 F.2d 741 (8th Cir. 1975).

I. The Fifth Circuit's Decision Is a Serious Departure from the Accepted Course of Bankruptcy Proceedings Because It Nullifies the Specific Procedure Established Under the Bankruptcy Code for Resolving Conflicts Between the Interests of Creditors and Government Agencies

Sections 105 and 362 of the Bankruptcy Code establish procedures designed expressly to balance the potentially competing interests underlying applicable nonbankruptcy laws, such as the federal banking laws, and the Bankruptcy Code. Section 362(a) of the Bankruptcy Code provides that the filing of a petition under the Bankruptcy Code operates as an *automatic* stay against virtually all acts or proceedings that interfere with the bankruptcy court's jurisdiction over the debtor's case. In pertinent part, section 362(a) provides that the filing of a petition for relief under the Bankruptcy Code operates as a stay against:

> (1) the commencement or continuation . . . of a judicial, *administrative*, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under [the Bankruptcy Code], or to recover a claim against the debtor that arose before the commencement of the case under [the Bankruptcy Code];
>
> * * *
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; [and]
>
> * * *
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under [the Bankruptcy Code].

11 U.S.C. § 362(a) (emphasis added). Significantly, the stay pursuant to section 362(a), including the stay of administrative proceedings, is congressionally created and does not require any judicial action to enjoin the proceedings stayed thereby.

The automatic stay under section 362(a) is one of the fundamental protective provisions of the Bankruptcy Code, designed to benefit creditors and other parties in interest—including governmental agencies—as well as the debtor. As explained in the legislative history accompanying the Bankruptcy Code:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally.

> A race of diligence by creditors for the debtor's assets prevents that.

H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977) (the "HOUSE REPORT"); *see also* S. REP. NO. 989, 95th Cong., 2d Sess. 49 (1978) (the "SENATE REPORT"). Thus, to prevent dismemberment of the estate and insure its orderly distribution, "[t]he scope of [the automatic stay] is broad" and applies to all proceedings, "including arbitration, license revocation, administrative, and judicial proceedings." HOUSE REPORT at 340.

In recognition of the importance of permitting a limited class of governmental proceedings to continue after the filing of a bankruptcy case, Congress provided two narrow exceptions to the automatic stay for certain actions by governmental units in furtherance of their police or regulatory power.[14] Specifically, sections 362(b)(4) and (5) of the Bankruptcy Code provide that the filing of a bankruptcy case does not operate as a stay:

> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power; [and]
>
> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

11 U.S.C. §§ 362(b)(4) & (5). These provisions do not, however, as the Board asserted below, "exempt from the automatic stay the full range of the government's regulatory activities." Board Brief at 28. The governmental action exceptions to the automatic stay were "intended to be given a *narrow construction* in order to permit governmental units to pursue actions to protect the public health and safety." 124 CONG. REC. S17406 (Oct. 6,

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14. In section 362(b), Congress also enumerated several specific exceptions to the automatic stay for certain actions by administrative agencies. Significantly, none of those specific exceptions apply to the Board's Administrative Proceedings.

1978) (statement of Senator DeConcini), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6505, 6513 (emphasis added).

Moreover, even as to governmental actions excepted from the automatic stay, "[t]he effect of an exception is not to make the action immune from injunction." SENATE REPORT at 51. Rather, under section 105(a) of the Bankruptcy Code, Congress empowered the bankruptcy courts to enjoin certain administrative proceedings even if excepted from the automatic stay. Specifically, section 105(a) grants the bankruptcy courts broad authority to issue any order "that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). As stated in the Senate Report:

> By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay. There are some actions, enumerated in the exceptions, that generally should not be stayed automatically upon commencement of the case, for reasons of either policy or practicality. Thus, the court will have to determine whether a particular action which may be harming the estate should be stayed.

SENATE REPORT at 51.

Thus, the express language of the Bankruptcy Code, reinforced by its legislative history, empowers bankruptcy courts to enjoin administrative proceedings—even administrative proceedings to enforce an agency's police or regulatory authority excepted from the automatic stay—that conflict with the bankruptcy court's jurisdiction, the rehabilitative functions, policies and goals of the Bankruptcy Code, or the efficient administration of a bankruptcy case. *See State of Missouri v. United States Bankruptcy Court*, 647 F.2d 768, 776 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982); *In re Shippers Interstate Serv., Inc.*, 618 F.2d 9 (7th Cir. 1980); *see generally In re Wedgewood Realty Group, Ltd.*, 878 F.2d 693 (3d Cir. 1989) ("Congress clearly envisioned that section 105(a) would be available to issue an injunction on a case-by-case basis in situations expressly excepted from the automatic stay.").

Sections 105 and 362 establish the structure for resolving the very types of conflict raised by the chapter 11 filings of bank holding companies and the Board's Administrative Proceedings. In this regard, Congress clearly provided that the resolution of such potentially competing interests should be determined by the district courts, which are invested with broad jurisdiction over all matters related to the bankruptcy case, rather than by administrative agencies that may have parochial interests in conflict with those of other parties in interest in the bankruptcy case.

In issuing the Preliminary Injunction, the District Court exercised its equitable discretion under section 105 of the Bankruptcy Code and achieved an appropriate balance between the potentially competing federal interests underlying the banking laws and the Bankruptcy Code, precisely as contemplated by Congress in enacting sections 105 and 362. Balancing "the function of the regulation, the probability of direct public harm, the opportunity for the public interest to be effectively represented in the bankruptcy proceeding, and the relation between the regulation and the financial, legal, and structural requirements for an effective reorganization," the District Court concluded that "the Board's generalized, diffuse interest in the holding company as well as the duplicative, distracting hearings militate for its being not exempt from the stay." Appendix A at A-10.

Yet the District Court was also careful to preserve the Board's ability to exercise its legitimate regulatory functions over the Debtors, holding that the Board could prosecute administrative proceedings that do not impermissibly interfere with the Debtors' assets or reorganization. Thus, the District Court enjoined only the narrow class of administrative proceedings that would directly conflict with the policies underlying the Bankruptcy Code and the jurisdiction of the Bankruptcy Court over the Debtors and their assets.

In overruling the District Court's authority to enjoin the 23A Proceeding, the Fifth Circuit's decision preempts Congress' procedure for resolving the potentially conflicting interests of the Debtors' creditors and the federal banking regulators. Further, the decision frustrates Congress' effort to streamline the bankruptcy process, and will result in substantial, needless and duplicative litigation concerning a prepetition claim against the Debtors. The Debtors' objection to the FDIC's proof of claim will be heard and determined by the District Court, irrespective of the continued prosecution or final determination of the 23A Proceeding. The prosecution of the Board's Administrative Proceedings will delay the Debtors' efforts to preserve their remaining businesses and develop a chapter 11 plan.

II. The Fifth Circuit's Decision Is a Serious Departure from the Accepted Course of Bankruptcy Proceedings Because It Contravenes Statutory Provisions that Bring All Bankruptcy-Related Matters Within the Jurisdiction of the Bankruptcy Courts

To insure the appropriate balance of the potentially competing policies of the Bankruptcy Code and applicable nonbankruptcy law, title 28 vests the bankruptcy courts with broad jurisdiction over all matters related to such cases. In holding that the FISA Anti-Injunction Provision overrides that jurisdictional mandate, the Fifth Circuit's decision directly conflicts with the language of section 1334 of title 28 and the clear intent of Congress in enacting the bankruptcy jurisdictional provisions.

A. Continued Prosecution of the 23A Proceeding Would Conflict with the District Court's Bankruptcy Jurisdiction

Section 1334(a) of title 28 vests the district courts, sitting as bankruptcy courts, with original and exclusive jurisdiction of all cases under the Bankruptcy Code.[15] In furtherance of this jurisdiction, section 1334(d) vests the district courts with "exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." Exclusive jurisdiction of the debtor's property is essential to effectuate the entire bankruptcy scheme. As this Court explained in a case decided under the former Bankruptcy

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15. Pursuant to 28 U.S.C. § 157(a), Congress authorized the district courts to refer any or all cases under the Bankruptcy Code and any or all proceedings related to such cases to the bankruptcy judges. Typically, the district courts have standing orders referring all such matters to the bankruptcy judges, subject to withdrawal of the reference pursuant to 28 U.S.C. § 157(d).

Act of 1898, the "jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of creditors." *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U.S. 734, 739 (1930).

To effectuate these policies, the Court in *Isaacs* held that "[w]hen [the bankruptcy court's exclusive] jurisdiction has attached, the court's possession cannot be affected by actions brought in other courts." *Id.* at 737. The Court stated:

> This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, *this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession.*

Id. at 737-38 (emphasis added). The holding of the Court in *Isaacs* has been applied in cases under chapter 11 of the Bankruptcy Code. *See In re Modern Boats, Inc.*, 775 F.2d 619 (5th Cir. 1985) (the filing of a petition under chapter 11 divested an admiralty court of *in rem* jurisdiction over a vessel acquired prior to the filing of the petition); *In re Louisiana Ship Management, Inc.*, 761 F.2d 1025 (5th Cir. 1985) (same). Section 1334(d) thus reflects Congress' recognition that control over the debtor's assets is so fundamental to a bankruptcy court's administration of a case that no other tribunal should be permitted to interfere with its exclusive jurisdiction over such assets.

To ensure effective administration of a bankruptcy case and to prevent piecemeal litigation in multiple forums, title 28 also provides that the jurisdiction of another tribunal—even exclusive jurisdiction—does not oust the district court, sitting in bankruptcy, from exercising jurisdiction over *all matters* relating to a debtor's bankruptcy case. Section 1334(b) provides:

> *Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts*, the district court shall have original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code], or arising in or related to cases under [the Bankruptcy Code].

28 U.S.C. § 1334(b) (emphasis added). The all-encompassing scope of section 1334(b) is aptly described in COLLIER ON BANKRUPTCY, the leading treatise on bankruptcy law:

> This provision is in accordance with the intent of Congress to bring all *bankruptcy-related litigation* within the umbrella of the district court, at least as an initial matter, irrespective of congressional statements to the contrary in the context of other specialized litigation.

1 COLLIER ON BANKRUPTCY ¶ 3.01[c][ii], at 3-22 (15th ed. 1990) (emphasis added). Indeed, the broad grant of jurisdiction over matters related to bankruptcy cases was at the heart of the sweeping changes in the jurisdiction granted to bankruptcy courts under the Bankruptcy Reform Act of 1978.[16] As stated in the legislative history of section 1334(b):

> This broad grant of jurisdiction will enable the bankruptcy courts, which are created as adjuncts to the district court for the purpose of exercising jurisdiction, to dispose of controversies that arise in bankruptcy cases or under the bankruptcy code. Actions that formerly had to be tried in State court or in the Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy court.

SENATE REPORT at 153; HOUSE REPORT at 445.

Through the 23A Proceeding, the Board seeks to bring vital aspects of the administration of the Debtors' assets and chapter 11 cases within its own jurisdiction despite Congress' clear intent to bring all bankruptcy-related litigation before the bankruptcy courts. At bottom, the 23A Proceeding involves only a "garden variety" commercial dispute with chapter 11 debtors over prepetition transactions. In view of the seizure of the Closed MBanks, and the pendency of the chapter 11 cases, such charges

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16. The original jurisdictional provisions added by the Bankruptcy Reform Act were codified at 28 U.S.C. § 1471 (repealed). The Bankruptcy Amendments and Federal Judgeship Act of 1984 repealed section 1471, but incorporated the relevant provisions thereof, without changes which are material hereto, and codified them at 28 U.S.C. § 1334.

duplicate the claims that the FDIC, as receiver for MBank Houston and MBank Dallas, has asserted against the Debtors in the chapter 11 cases and are, therefore, little more than a thinly disguised effort to avoid the bankruptcy court jurisdiction so as to bootstrap the FDIC claims. The alleged actions which the Board seeks to redress occurred over two years before the commencement of the Debtors' cases and affect banks which are no longer owned or controlled by the Debtors.

Further, the Fifth Circuit's ruling enables the Board to prosecute its 23A Proceeding for the benefit of the FDIC before an administrative law judge (with a final decision to be made by the Board itself), while the FDIC simultaneously pursues its own claim against the Debtors based on the same prepetition transactions in the District Court. Thus, unless the decision below is reversed, the Debtors will be required to litigate the issues concerning these prepetition transactions twice—once before the District Court and again before the Board—with the concomitant possibility that the two tribunals may reach contradictory determinations of the same claim against the Debtors. The Fifth Circuit ignored this possibility of bifurcated litigation and inconsistent rulings, a result that patently violates the letter and spirit of the Bankruptcy Code. Indeed, as noted in the HOUSE REPORT, bifurcated and duplicative litigation is the very harm that section 1334(b) is intended to avoid:

> H.R. 8200 grants the bankruptcy courts broad and complete jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases. . . . All matters arising under title 11, or arising under or related to cases under title 11 will be within the jurisdiction of the bankruptcy court, including proceedings to which the trustee is a party, proceedings to which the debtor is a party if the outcome of the proceeding will have an impact on the case . . ., and all proceedings involving the administration of the case. *The forum shopping and jurisdictional litigation that have plagued the bankruptcy system, the unfairness to defendants from "jurisdiction by ambush," and the dissipation of assets and the expense associated with bifurcated jurisdiction will be eliminated by the jurisdiction proposed by this bill.*

HOUSE REPORT at 48-49 (emphasis added) (footnotes omitted).

In addition to forcing needless and duplicative litigation in two fora, the Board's thinly disguised attempt to prosecute the FDIC's claim would bypass the very due process protections for other parties in interest in the chapter 11 case that the Bankruptcy Code's claims process is intended to provide. In particular, section 502 of the Bankruptcy Code expressly provides any party in interest, including other creditors, the right to object to a claim and, in the event of such an objection, provides for a hearing before the bankruptcy court. In contrast, if the Board is permitted to proceed with the 23A Proceeding, its determination would be made in a private "hearing" before an administrative law judge who will recommend findings to the Board. Past actions of the Board provide no reason to conclude that the Board in its Administrative Proceedings would even consider the interests of the Debtors' creditors and stockholders.

In addition to the apparent conflict with the District Court's concurrent jurisdiction under section 1334(b), continued prosecution of the 23A Proceeding also threatens the District Court's exclusive jurisdiction under section 1334(d) over the Debtors' assets. Contrary to the Fifth Circuit's suggestion that the Board's 23A Proceeding will be limited to "mak[ing] a determination on the legitimacy of the credit transaction," Appendix C at C-11, the mere issuance of a final cease and desist order may prejudice the Debtors and their estates and may deplete the Debtors' assets. Section 8(i)(2) of FISA, 12 U.S.C. § 1818(i)(2), provides that any institution that violates a final cease and desist order "shall forfeit and pay a civil penalty" of up to $1 million a day. Accordingly, if the Board issued a cease and desist order compelling the Debtors to transfer assets to the receivership estates, the Debtors could begin to incur a $1 million a day penalty upon entry of the cease and desist order because any amounts owed could not be paid to the FDIC as the receiver for such MBanks except pursuant to a chapter 11 plan. Thus, contrary to the Fifth Circuit's assumption that "the Board's proceedings do not directly concern the debtor's property," Appendix C at C-7, the Board's action could directly impact upon the Debtors' assets and the recovery other parties in interest will receive.

B. The FISA Anti-Injunction Provision Does Not Supersede the Bankruptcy Jurisdiction

The Board's principal challenge to the Preliminary Injunction is that the FISA Anti-Injunction Provision bars any court, including the District Court, from enjoining the Board from prosecuting its Administrative Proceedings.[17] In pertinent part, the FISA Anti-Injunction Provision provides:

> [E]xcept as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

12 U.S.C. § 1818(i). Based upon this provision, the Board asserts exclusive jurisdiction over all matters affecting bank holding companies irrespective of the filing of the Debtors' chapter 11 cases and the resulting jurisdiction of the District Court.

1. Section 1334(b) Confers All-Encompassing Jurisdiction on the District Courts over a Debtor's Assets and Reorganization and Takes Precedence over Statutes that Grant Exclusive Jurisdiction to Another Tribunal

Section 1334(b) confers on the district courts, sitting in bankruptcy, jurisdiction over all civil proceedings related to a chapter 11 case, "*[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts.*" 28 U.S.C. § 1334(b). The basis for the Fifth Circuit's decision is that the italicized phrase does not apply when Congress has conferred exclusive jurisdiction over a matter to an administrative agency rather than another court. No court has ever before given section 1334(b) such a gloss

17. In this regard, the Board completely ignores the well established principle that a statute, such as the FISA Anti-injunction Provision, that withdraws jurisdiction from courts does not bar a court from enjoining an administrative proceeding that is beyond the authority of the administrative agency. *See Leedom* v. *Kyne*, 358 U.S. 184 (1958). That principle has been applied expressly to the FISA Anti-Injunction Provision in this case and others. *See Manges* v. *Camp*, 474 F.2d 97 (5th Cir. 1973).

and, as the Fifth Circuit acknowledged, such a holding contradicts the holdings of the only other cases that have addressed the issue.[18]

Despite the clear language and congressional intent under section 1334(b) to confer on the district courts "the broadest grant of jurisdiction to dispose of proceedings that arise in bankruptcy cases or under the bankruptcy code," HOUSE REPORT at 443, the Fifth Circuit failed to provide any rationale for distinguishing between courts and administrative agencies under section 1334(b) and such a distinction defies logic.[19] In light of the broad purposes of section 1334(b), it is inconceivable that Congress vested the district courts with jurisdiction over legal proceedings before another court, and simultaneously deprived the courts of jurisdiction to deal with administrative proceedings. Indeed, section 362(a) expressly provides for a stay, by operation of the filing of a chapter 11 petition, of judicial *and administrative* proceedings.

18. *See In re Casey Corp.*, 46 B.R. 473, 476 (S.D. Ind. 1985) (bankruptcy court has jurisdiction despite grant of exclusive jurisdiction to United States Court of Claims to determine certain contract claims against the United States, concluding that "§ 1471 [the predecessor of section 1334] takes precedence over §§ 1346(a)(2) and 1491 *because of the 'notwithstanding any Act of Congress' clause in § 1471*") (emphasis added); *In re Shelby County Healthcare Services of Alabama, Inc.*, 80 B.R. 555 (Bankr. N.D. Ga. 1987) (section 1334(b) overrides 42 U.S.C. §§ 405(h) and 1395oo which "established the exclusive method of administrative and judicial review and appeal of Medicare cost reimbursement determinations"). The Fifth Circuit acknowledged these contrary holdings, but, without further discussion, stated that "[t]hese cases are not binding upon this court, however, nor do we find their reasoning persuasive as to the issue before us." Appendix C at C-6–C-7.

19. The reliance by the Fifth Circuit on the cases construing the FISA Anti-Injunction Provision is misplaced. Those cases do not involve *any*, much less an overriding, statutory grant of jurisdiction to another tribunal such as the District Court. *Groos National Bank* v. *Comptroller of the Currency*, 573 F.2d 889 (5th Cir. 1978) and *Abercrombie* v. *Comptroller of the Currency*, 833 F.2d 672 (7th Cir. 1987), both cited by the court, involve the straightforward application of the FISA Anti-Injunction Provision to cases which arise solely under section 1818 of title 12. These cases are simply inapplicable to an adversary proceeding initiated in a chapter 11 case. *See In re Casey Corp.*, 46 B.R. at 476 (although the cases cited confirm the exclusive jurisdiction of the Court of Claims, "none of those cases arose in or were related to cases under Title 11").

The actions of an administrative agency often have as great an impact on a debtor's reorganization as an action of another court. Unless bankruptcy courts have the power and authority Congress bestowed on them under sections 105 and 362 to enjoin any action which threatens the bankruptcy courts' jurisdiction and debtors' assets and reorganizations, including administrative actions which are expressly subject to the automatic stay, the ability of debtors to reorganize will be jeopardized and significantly impaired and the Bankruptcy Code will be frustrated.

2. The Fifth Circuit's Decision Unnecessarily Brings the Bankruptcy Code and the Banking Laws into Conflict

The Fifth Circuit decision effectively carves out from the otherwise all-encompassing bankruptcy jurisdiction certain administrative proceedings that the Board or any other federal banking regulator determines to commence under section 8 of FISA. The decision, therefore, gives the federal banking regulators license, at least in certain circumstances, to ignore completely the filing of a chapter 11 case irrespective of the consequences of their actions on the debtor's assets and reorganization effort. If adhered to, the Fifth Circuit decision would render the bankruptcy courts powerless to deal with such actions even in matters such as the determination of claims that are at the "core" of the bankruptcy jurisdiction. *See* 28 U.S.C. § 157(b)(2)(B). Such a result is wholly inconsistent with the provisions and policies of the Bankruptcy Code.

The two statutes can be reconciled by applying the plain language of section 1334(b). That provision expressly contemplates other conflicting grants of jurisdiction and evinces Congress' unmistakable intent that the Bankruptcy Code jurisdictional provisions override, but do not preempt, the exclusive jurisdiction of other tribunals.[20] This reconciliation accords appropriate significance to the fact that the FISA Anti-Injunction Provision existed and was presumptively known to Congress at the time

20. Notably, the banking laws, while providing an anti-injunction provision, do not provide for exclusive jurisdiction in banking agencies. The Bankruptcy Code, on the other hand, provides for all-encompassing jurisdiction in the bankruptcy courts notwithstanding the grant of "exclusive jurisdiction" to other tribunals.

of the enactment of section 1334(b) and may be used for regulatory or other purposes that do not affect the property of a chapter 11 debtor.[21] The Bankruptcy Code, unlike the federal banking laws, also provides a rational and statutorily sanctioned procedure to balance the competing interests and goals of the federal banking laws and the Bankruptcy Code and the respective constituencies served by each.

21. The FISA Anti-Injunction Provision was enacted in 1966 as part of FISA and has remained unchanged since that time. Section 1471(b), the predecessor of 1334(b), was enacted as part of the Bankruptcy Reform Act of 1978. Clearly, if Congress had intended to except the Board's administrative proceedings from the grant of jurisdiction under section 1334(b), it could have drafted the first clause of section 1334(b) to read "notwithstanding any Act of Congress *other than section 1818(i) of Title 12*." By declining to exclude or exempt proceedings under section 1818, Congress evinced its intent to bring such proceedings within the jurisdictional reach of this Court.

Moreover, Congress clearly considered the interaction of the Bankruptcy Code and the regulation of banking enterprises. In section 109 of the Bankruptcy Code, Congress specifically excluded banks, but not bank holding companies, from filing or being involuntarily petitioned into a case under the Bankruptcy Code. 11 U.S.C. §§ 109(b) and (d). The refusal of Congress to prohibit bank holding companies from being debtors under the Bankruptcy Code must, therefore, be taken as evidence of Congress' intent that bank holding companies are entitled to all of the protections afforded by the Bankruptcy Code and, as the later enacted statute, section 1334(b) should control and take precedence over any contradictory provisions of the FISA Anti-Injunction Provision.

Notably, the intent of Congress under section 1334 was implicitly reaffirmed by Congress when it enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989, P.L. 73, 101st Cong., 1st Sess. ("FIRREA"). In Title IX of FIRREA, signed into law on August 9, 1989, Congress dramatically amended section 8 of FISA to enhance the regulatory and supervisory authority of the federal banking regulators thereunder. Despite the notoriety of the District Court's decision rendered in this case just two months prior to the enactment of FIRREA, Congress took no action whatsoever to overturn the District Court's Preliminary Injunction, although it expressly legislatively overruled several other recent court decisions. For example, Congress expressly overruled the decision of the Circuit Court for the District of Columbia in *Stoddard* v. *Board of Governors*, 868 F.2d 1308 (D.C. Cir. 1989), which had held that the Board had no authority to impose liability on former officers of a bank holding company. Had Congress intended to elevate the FISA Anti-Injunction Provision over section 1334 and thereby exempt the Board's Administrative Proceedings from the expansive grant of jurisdiction in section 1334, it had every opportunity and could have done so as part of the sweeping changes effected in FIRREA.

III. The Fifth Circuit's Decision Conflicts with a Decision in Another Circuit that Holds that the Bankruptcy Code Overrides a Similar Anti-Injunction Statute

The FISA Anti-Injunction Provision is analogous to the tax anti-injunction provision, 26 U.S.C. § 7421(a), which limits judicial interference with the Internal Revenue Service's assessment and collection functions. In *Bostwick* v. *United States*, 521 F.2d 741 (8th Cir. 1975), the Eighth Circuit held that the Bankruptcy Code overrides the tax anti-injunction statute and authorizes bankruptcy courts to enjoin the assessment and collection of taxes. In *Bostwick*, the debtors filed a motion to determine whether taxes owed to the federal government were discharged pursuant to the bankruptcy court's order of discharge. Thereafter, the debtors sought to enjoin the Internal Revenue Service from collecting back taxes from the debtors until the bankruptcy court could determine the motion. The government argued that the tax anti-injunction statute prohibited the bankruptcy court from entertaining the injunctive action. In pertinent part, the tax anti-injunction provision then in effect provided:

> Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

26 U.S.C. § 7421(a) (quoted in *Bostwick*, 521 F.2d at 744). After noting that none of the exceptions specified in section 7421(a) applied, the Court of Appeals stated:

> However, we do not believe that the "anti-injunction statute" is relevant to the present case inasmuch as Congress has evidenced an intention to enact a complete scheme governing bankruptcy which overrides the general policy represented by the "anti-injunction" act.
>
> * * *

> *We believe that the overriding policy of the Bankruptcy Act is the rehabilitation of the debtor and we are convinced that the Bankruptcy Court must have the power to enjoin the assessment and/or collection of taxes in order to protect its jurisdiction, administer the bankrupt's estate in an orderly and efficient manner, and fulfill the ultimate policy of the Bankruptcy Act.*

521 F.2d at 744 (emphasis added).

Given the similarity between the FISA and tax anti-injunction provisions and the fact that this proceeding, like the IRS proceeding in *Bostwick*, represents an attempt to determine a prepetition claim, the Fifth Circuit's decision squarely conflicts with the Eighth Circuit's decision in *Bostwick*.[22]

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22. In support of its decision that the FISA Anti-Injunction Provision bars the bankruptcy courts from enjoining administrative actions by the federal banking regulators under FISA, the Fifth Circuit cited three cases—*Briggs Transportation Co.* v. *International Brotherhood of Teamsters*, 739 F.2d 341 (8th Cir.), *cert. denied*, 469 U.S. 917 (1984), *In re Crowe & Associates*, 713 F.2d 211 (6th Cir. 1983) and *In re Petrusch*, 14 B.R. 825 (N.D.N.Y.), *aff'd*, 667 F.2d 297 (2d Cir. 1981) (per curiam), *cert. denied*, 456 U.S. 974 (1982)—interpreting the so-called "anti-injunction" provisions of the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, in the context of the automatic stay and section 105 of the Bankruptcy Code. These cases are, however, inapposite. Section 4 of the Norris-LaGuardia Act prohibits federal courts from enjoining persons from engaging in certain labor activities in labor disputes. In each of the cases cited by the Fifth Circuit, the debtor sought to invoke the automatic stay to prohibit its employees from picketing. The courts found, however, that section 4 of the Norris-LaGuardia Act gave the employees the absolute right to strike notwithstanding the automatic stay.

As *Briggs Transportation* makes clear, the Norris-LaGuardia Act anti-injunction provision is intended to protect substantive rights of private parties. 739 F.2d at 344. In contrast, the FISA Anti-Injunction Provision merely specifies which tribunal should ordinarily hear the administrative proceedings initiated by the federal banking agencies. No substantive right is created or protected by the FISA Anti-Injunction Provision. Thus, the Fifth Circuit's reliance on the Norris-LaGuardia Act cases is clearly misplaced and, indeed, none of the cases cited by the court even involved the action of any administrative agency.

CONCLUSION

Because the Fifth Circuit's decision conflicts with the decision of another circuit, overrides the express purpose and language of the Bankruptcy Code, creates an unnecessary conflict between the banking laws and the Bankruptcy Code and is of great importance to debtors and their creditors and stockholders, the Court should grant the Petitioners' petition for a writ of certiorari.

Dated: New York, New York
December 10, 1990

Respectfully submitted,

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APPENDIX A

United States District Court
Southern District of Texas
Houston Division

In Re:

MCORP
MCORP FINANCIAL, INC., and
MCORP MANAGEMENT,
Debtors.
Case No. 89-02312-H3-11

MCORP,
MCORP FINANCIAL, INC., and
MCORP MANAGEMENT,
Debtors in Possession,

Plaintiffs,

and

OFFICIAL CREDITORS' COMMITTEE,
Intervenor,

vs.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA,
Defendant.

CIVIL ACTION NO. 89-1677
(Adversary 89-0298)

OPINION ON THE PRELIMINARY INJUNCTION AGAINST THE FEDERAL RESERVE SYSTEM

1. *Introduction.*

As debtor in possession, a bank holding company and two of its nonbank subsidiaries (MCorp, MCorp Financial, Inc., and MCorp Management (Debtor)) applied for a preliminary injunction against the Board of Governors of the Federal Reserve System (Board). The Debtor seeks to enjoin the Board from prosecuting administrative proceedings against the holding company and its nonbank subsidiaries as part of the Board's regulation of the safety and integrity of the bank subsidiaries. The issue is whether a nonbank corporation that owns banks and nonbanks as subsidiaries is entitled to have its bankruptcy case principally directed by the banking agencies or by the bankruptcy process. An injunction will be issued to allow possible reorganization of the Debtor through the bankruptcy court.

2. *Statutes.*

The Debtor asserts:

A. This court sitting in bankruptcy has exclusive jurisdiction over all the property in the debtor's estate. 28 U.S.C. § 1334(d);

B. The Board's actions are in reality an attempt to control the assets of the estate in violation of the automatic stay. 11 U.S.C. § 362(a).

C. If the Board is exempt from the automatic stay, the bankruptcy code authorizes an injunction to protect the debtor from third-party interference. 11 U.S.C. § 105.

The Board counters:

A. The Financial Institutions Supervisory Act (FISA) withdraws jurisdiction from the courts, superseding the automatic stay imposed by the bankruptcy code. 12 U.S.C. § 1818(i).

B. The Board's proceedings are regulatory actions exempted from the automatic stay. 12 U.S.C. § 1818 (b); 11 U.S.C. § 362 (b).

C. The character of the regulation and the general scheme of banking supervision are not the third-party acts that should be subject to an injunction against interference with a bankruptcy case.

3. *Background of the Controversy.*

At the beginning of 1989, Mcorp was a bank holding company, owning twenty-five bank subsidiaries and several nonbank subsidiaries. In common with many financial institutions, MCorp has suffered large, continuing losses from its real estate loans, having already written down its bad oil-related loans. In March, the comptroller of the currency declared twenty of MCorp's banks insolvent and closed them. The banks continued to operate as nationalized receiverships through the Federal Deposit Insurance Corporation under the name Deposit Insurance Bridge Bank.

This civil action was an adversary proceeding in the consolidated bankruptcy case to reorganize MCorp, and the reference by the district court to the bankruptcy court was withdrawn. (Adversary Number 89-0298.) The other actions are:

A. An involuntary petition was filed in the Southern District of New York against MCorp and it was transferred here to pend under Case Number 89-02848-H2-11.

B. A voluntary petition was filed in the Southern District of Texas by MCorp Management under Case Number 89-02324-H5-11.

C. A voluntary petition was filed in the Southern District of Texas by MCorp Financial, Inc., under Case Number 89-02312-H3-11.

The filing in New York of the involuntary case precipitated the bank closings by the comptroller and the voluntary cases by the subsidiaries. The official Creditors' Committee of the debtors was allowed to intervene to assert essentially the same grounds as MCorp in support of an injunction.

MCorp is left with five bank subsidiaries and all of its nonbank subsidiaries, two of which are also debtors in bankruptcy. MCorp maintains that twelve of its banks were closed illegally

or improvidently. The closed institutions are not under the control of MCorp because they are under FDIC receiverships.

The Federal Reserve Board has initiated administrative actions against MCorp as a bank holding company for violating its regulations that ensure the integrity of the banking system through the requirement that the holding company be a "source of financial strength" to the subsidiary banks. The administrative actions will conflict with MCorp's ability to address a global reorganization in the bankruptcy case.

4. *Standard for Injunctive Relief.*

This proceeding is in the nature of a preliminary declaratory judgment rather than a normal preliminary injunction which maintains some status between principal litigants until the merits of their claims have been heard. This injunction will prospectively assign one authority or another to supervise a restructuring.

Despite the peculiar nature, this injunction meets the regular requirements. *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974).

A. MCorp is likely to prevail on the merits of its legal priority claim. The automatic stay is applied rigorously, and only in exceptional cases is there a departure from protecting the debtor. Where the regulation is inextricably mixed with the restructuring process rather than some ancillary public health or safety question, MCorp ought to succeed with its claim of insulation from the Board by the automatic stay. Even if the regulatory exemption applies, the highly probable result is MCorp's success because of the availability of the anti-interference protection.

B. Enjoining the Board is necessary to prevent imminent and irreparable harm to the Debtor; responding to the Board's proceedings deprives MCorp of resources desperately needed to prepare for its reorganization. If MCorp is to survive, to the benefit of the creditors and the government, it must act quickly, for a lingering Chapter 11 case inevitably becomes a liquidation. Obliging MCorp

to respond in multiple forums to multiple agencies, each with its own internal and external priorities, would dissolve the focus MCorp needs to see the route to survival.

C. The risk to MCorp in both probability and magnitude exceeds the possible danger to the Board's interests. The safeguards of the bankruptcy code ensure the protection of the generalized interest of the Board in healthy holding companies. The Board's exposure to liability independent of its regulatory concern is minimal, and it is not jeopardized by this injunction. Its interest can adequately be represented in the bankruptcy proceedings.

D. The issuance of this injunction does not harm the public interest defined either as the general public interest or as the discernible interests of unrepresented third-parties. To the contrary, the public is served by having all proceedings in one forum, especially a forum where the individuals in the affected public can participate.

5. *Issue.*

When a bank holding company seeks reorganization under the bankruptcy code, does the general bankruptcy process supersede the processes of the agencies that regulate banking?

6. *Regulatory Framework.*

A. *Comptroller of the Currency.*
General supervision of national banks, including their creation and closing, is confided to the comptroller of the currency. If, on his examination, the comptroller determines that a bank is insolvent, he places it in receivership. That receiver is the FDIC. 12 U.S.C. § 191.

B. *Federal Deposit Insurance Corporation.*
The FDIC has two roles in banking regulation. First, it acts as a limited insurer of deposits to attract depositors to the banking system and to prevent runs, with their destructive effects. Second, the FDIC acts as a receiver for the estate of a bank that has been closed by the comptroller. 12 U.S.C. § 1811.

C. *Federal Reserve Board.*
The Federal Reserve System is the central bank for the United States, and among its powers are responsibilities for the regulation of banks and bank holding companies. The Board's regulation takes many forms, like its clearinghouse function, furnishing liquidity, margin and capital requirements, open market purchases and sales, and currency issuance.

Under the FISA, if the Board finds that a bank holding company has engaged in an unsafe or unsound practice, the Board has the authority to notify the company of its charges, stating the violations and setting a hearing before the Board. 12 U.S.C. § 1818(b). If the charges are proved, the Board can order the company to stop the derelict practices and to take affirmative steps to prevent future violations.

Temporary orders to desist may also be issued by the Board before proceedings are completed. These orders may be issued without a hearing and are effective immediately.

Because the purpose of vesting the Board with these powers is to assure the soundness of banks that are owned by holding companies, transactions between the parent company and its nonbank subsidiaries may be regulated to prevent losses to the bank subsidiaries.

7. *Classes of Regulation by the Board.*

The Board has claimed four classes of authority over the Debtor and its components. First, the Board is empowered to regulate the banking process, through its clearinghouse function, for example.

Second, the most obvious class of power that the Board has over banks is through its central bank functions. These directly affect the parties here, through reserve and margin requirements for instance, but they are fashioned at a higher level than individual bank operation. These are not involved; the bank subsidiaries of MCorp will continue to abide by the Board's general regulation of banking transactions.

Third, the Board is charged generally with supervision of bank and bank holding company practices that may endanger the integrity of the banks and the system of banks. These vaguely defined powers cover items from the requirement of minimum capital to the prohibition of self-dealing.

Fourth, the Board asserts the authority to direct the activities, of the holding company's nonbank subsidiaries in their transactions unrelated to banks or banking including forcing a sale for capital infusion.

8. *Priority of Regulation.*

Banks cannot file for bankruptcy; they must reorganize or liquidate under the banking laws. Bank holding companies, however, are not prohibited from recourse to bankruptcy, and while they are regulated by banking agencies, they cannot be reorganized or liquidated under the laws for banks. Congress has amended both the banking and the bankruptcy laws several times, never resolving this potential conflict.

The new bankruptcy code was adopted in 1978, long after bank holding companies had been regulated. The holding company act has been frequently amended itself. The dual nature of bank holding companies implicates the interests of the systems both of regulation and of reorganization. The statutes as enacted limit the bank regulators to primacy in dealing with banks.

When a bank holding company is a debtor in possession, the conflict between the court's restructuring of the corporation and the Board's regulating can be resolved by allowing the Board to participate in the court proceeding. Preclusion by the bankruptcy forum would not cover the Board's clearinghouse or monetary functions, but it would restrict the Board's supervision of MCorp's asset allocation, intra-group transactions, and third-party contracts. This would give the Debtor the reprieve needed to retrieve its vitality.

Allowing the Board's proceedings to continue in a separate forum poses several problems. Parallel proceedings are both confusing and inefficient. The potential for a successful reorganization would be jeopardized. The bankruptcy code is designed

to be a comprehensive plan to rehabilitate the debtor to the exclusion of actions impairing reorganization.

9. *Regulatory Exception to the Stay.*

Even if the principal power over the debtor's estate is in the bankruptcy court, agencies whose mandate includes matters of "police or regulatory power" are not barred by the filing of a petition from pursuing the debtor. 11 U.S.C. 362(b)(4). Although very few imaginable acts of a governmental unit could not plausibly be claimed to be within that category, congress did not act to exempt all governmental actions from the automatic stay, for the phrase "police and regulatory power" is a peculiar way to say "all."

A. There are two tests usually articulated in deciding whether the stay applies to a governmental action. Although neither of these dichotomies is particularly applicable with precision, they both do recognize that there are automatically stayed governmental activities.

(1) The first divides governmental actions into two categories: pecuniary interest of the state in the debtor's estate or public policy affecting safety and health.

(2) The second divides governmental actions into two slightly different categories: those that adjudicate private rights and those that effectuate public policy. *See N.L.R.B. v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir. 1986).

B. A solution to the definitional problem can be reached on procedural grounds. The principal difference between the automatic stay and the anti-interference injunction is the burden on the participants. For ordinary acts against the debtor's property, the stay has minimal risk to those who are blocked or the public. Because the automatic stay of private acts against the debtor's estate covers the majority of the debtor's relations, it has enough relief to allow reorganization. For governmental acts (as well as third-parties) to be blocked, however, the debtor must identify and move against them specifically through an

injunction. The effect of this reading would produce a clear and reasonable approach, but it would still be an alteration of the plain text of the statute.

C. One solution to the lack of precision in the clause that allows some escape by governments from the stay is to attempt to classify governmental actions between those that are of immediate, actual concern to the health of the general public and those that are assists to private parties, asset allocations, and property acquisitions for its own account, as they are at cross purposes with the federal reorganization powers.

The Board's interest in protecting the public from "unsafe" banking practices may be important, but it does not rise to the level of injury or immediacy of aircraft certification, adulterated foods, or transportation of diseased livestock. 12 CFR 225, Reg. Y. In a case involving the Environmental Protection Agency, a court of appeals has said that the scope of the exemption from the stay is not limited to matters of imminent physical peril; however, the case dealt with a landfill without several safeguards, including a prevention of polluted runoff, so the comment was an observation, not a holding. *Matter Commonwealth Oil Refining Co., Inc.*, 805 F.2d 1175 (5th Cir. 1986) *cert. denied sub nom, Commonwealth Oil and Refining Co. v. E.P.A.*, 483 U.S. 1005, 107 S. Ct. 3228 (1987). Notably, the legislative history of the code reveals that bankruptcy courts had been enforcing the automatic stay against state pollution abatement efforts. *See* HR Rep. No. 95-595, 95th Cong., 1st Sess., 174-5 (Bankruptcy Reform Act of 1978).

One court has held that access to assets that are necessary to the business's future vitality are exempt regulatory matters, and not even property of the debtor's estate since the assets were useful only through further regulation. *In re Braniff Airways*, 700 F.2d 935 (5th Cir. 1983) (landing slots necessary for reorganization were not subject to bankruptcy court orders over FAA).

On the other hand, there are cases restricting the exemption from the stay to matters directly affecting the public safety, which should not be interrupted pending a hearing to lift the stay. Others have held that some parallel proceedings, like competing license applications, that might require some distraction to the debtor's reorganization effort are not stayed through the exemption even though they do not involve palpable health hazards. *See Jordan v. Randolph Mills. Inc.*, 716 F.2d 1053 (4th Cir. 1983); *In re D.H. Overmyer Telecasting Co. Inc.*, 35 B.R. 400 (Bankr. N. D. Ohio 1983).

10. *Governmental Actions Not Excepted from the Stay.*

Ignoring the distinction between "all" and "police-regulatory" is easy and wrong; by the plain terms of the statute there are governmental actions that are not exempted from the stay. To determine whether a governmental function is among those that should be exempt, the court must evaluate the function of the regulation, the probability of direct public harm, the opportunity for the public interest to be effectively represented in the bankruptcy proceeding, and the relation between the regulation and the financial, legal, and structural requirements for an effective reorganization. *See In re King Memorial Hospital, Inc.*, 4 B.R. 704 (Bankr. S.D. Fla. 1980); *In re Joe DeLisi Fruit Co.*, 11 B.R. 694 (Bankr. D. Minn. 1981).

Both the Board's generalized, diffuse interest in the holding company as well as the duplicative, distracting hearings militate for its being not exempt from the stay.

11. *Reorganization by Subterfuge.*

MCorp argues that the current state of regulatory orders issuing from the Board is effectively an attempt by the Board to control the estate of the Debtor for the purpose of dictating mcorp's future structure. While this appears plausible, it is unnecessary to address it in detail because the stay applies to most of the regulation and because the Board is subject to the anti-interference prohibition. 11 U.S.C. § 105.

The bankruptcy court can scrutinize the potential for undisclosed motivations when the Board presents a motion to lift the stay.

12. *Anti-Interference Authority.*

Whatever the role of the automatic stay, the bankruptcy code authorizes an injunction against third parties from conducting otherwise fully legitimate actions when those actions would impede the viability of the debtor's reorganization. The Board claims an exemption from the anti-interference power parallel to the regulatory exemption from the automatic stay. Virtually any company is subject to a variety of regulatory agencies, and no reorganization would be possible without requiring the federal, state, and local authorities to submit their claims through the bankruptcy process. Securities issued as a consequence of a bankruptcy supervised reorganization are expressly exempt from the registration requirements of the Securities and Exchange Commission. 11 U.S.C. § 1145.

The court shares the Board's concern that the laudable but limited purposes of bankruptcy not be perverted into an escape from regulation. The bankruptcy process includes a vigilant, fully empowered judge who will prevent individual or collusive efforts to evade the Debtor's responsibilities to the public.

The Board's interest in MCorp, as distinct from the comptroller or FDIC's interest in the banks, is secondary and diffuse. The overlapping authority between bank regulators and bankruptcy courts is resolved in favor of the court. As an example, when responding to a receivership imposed by a district court under the Securities and Exchange Commission's authority, it has been said that "To the extent that the exercise of this jurisdiction threatens the assets of the debtor's estate, the bankruptcy court may issue a stay of those proceedings." *Securities & Exch. Comm'n v. First Fin. Group of Texas*, 645 F.2d 429, 440 (5th Cir. 1981).

13. *Conclusion.*

While the operation of the banking system under the guidance of the Board is an important interest, congress has also recognized

the importance of allowing debtors to restructure so that they may make a contribution to the economic vitality of the country. Under the circumstances of a bank holding company with nonbank subsidiaries, accommodation of the two national interests in bankruptcy and banking requires that the bankruptcy court have primacy over the non-operations aspects of the debtor and that the Board, after participating, abide by the capital allocation and structural aspects of the debtor as determined in the bankruptcy rather than conducting its independent actions.

The court is mindful that a debtor that follows MCorp's precedent may attempt to abuse the opportunity furnished by the bankruptcy code, but the principle here is clear, and it must be applied with care, even here. The court is also mindful of who was paid to prevent the bank practices that resulted in the collapse of the system in the Southwest. Neither side has an occasion for self-righteousness.

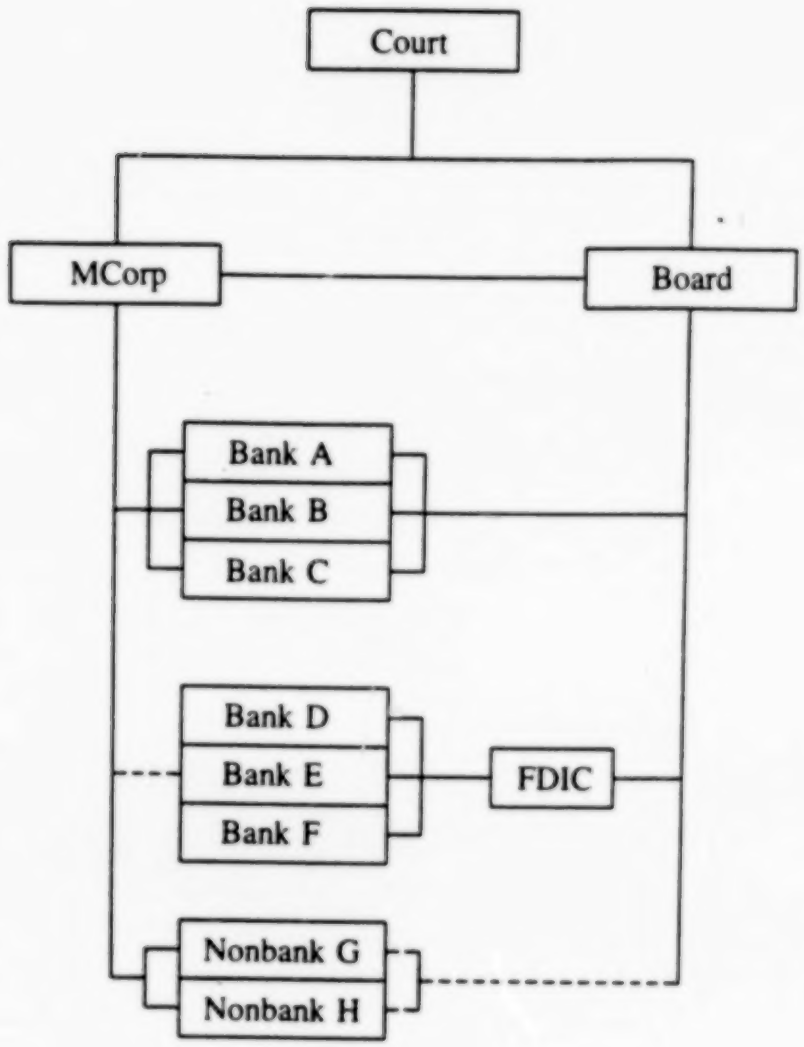
The Board will be enjoined to allow the claims in its pending charges to abate, except through the bankruptcy court.

Signed on June 19, 1989, at Houston, Texas, correcting case numbers and descriptions in the "Background of the Controversy" section of the opinion of June 9, 1989.

/s/ LYNN N. HUGHES

Lynn N. Hughes
United States District Judge

MCorp., et al., v. Federal Reserve System
Civil Action Number 89-2761; Appendix A.



A-C represent remaining subsidiary banks.
D-F represent subsidiary banks declared insolvent.
G-H represent nonbank subsidiaries.

APPENDIX B

United States District Court
Southern District of Texas
Houston Division

In Re:

MCORP
MCORP FINANCIAL, INC., and
MCORP MANAGEMENT,
Debtors.
Case No. 89-02312-H3-11

MCORP,
MCORP FINANCIAL, INC., and
MCORP MANAGEMENT,
Debtors in Possession,

Plaintiffs,

and

OFFICIAL CREDITORS' COMMITTEE,
Intervenor,

vs.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA,
Defendant.

CIVIL ACTION NO. 89-1677
(Adversary 89-0298)

PRELIMINARY INJUNCTION AGAINST THE FEDERAL RESERVE SYSTEM'S PROCEEDING ADMINISTRATIVELY AGAINST MCORP

1. *Parties.*

A. The parties plaintiff are:

(1) MCorp, a bank holding company;

(2) MCorp Financial, Inc., a non-bank subsidiary of MCorp; and

(3) MCorp Management, a non-bank subsidiary of MCorp.

(4) each of the plaintiffs are debtors in possession (MCorp collectively).

B. The Official Creditors Committee formed under the bankruptcy statutes has been allowed to intervene.

C. The party defendant is the Board of Governors of the Federal Reserve System of the United States (Board).

2. *Related Proceedings.* This civil action was an adversary proceeding in the consolidated bankruptcy case to reorganize MCorp, and the reference by the district court to the bankruptcy court was withdrawn. (Adversary Number 89-0298.) The other actions are:

A. An involuntary petition was filed in the Southern District of New York against MCorp, and it was transferred here to pend under Case Number 89-02848-H2-11.

B. A voluntary petition was filed in the Southern District of Texas by MCorp Management under Case Number 89-02324-H5-11.

C. A voluntary petition was filed in the Southern District of Texas by MCorp Financial, Inc., under Case Number 89-02312-H3-11.

D. The three bankruptcy actions have been consolidated under the earliest case number for joint administration.

3. *Reasons.* The court finds these to be reasons to grant injunctive relief:

A. The allocation of power to supervise bank holding companies conflicts when the corporation has sought protection

under the bankruptcy statutes, and the conflicts can be minimized only through the intervention of the court.

B. The waste and confusion attendant upon parallel bankruptcy and administrative proceedings would defeat the legislative expectation of both sets of statutes, harm irreparably the estates of the bankrupts and their creditors (including the various governmental claims), escalate transaction costs by duplication and conflict, and protect no public interest or governmental function not fully addressable in the bankruptcy proceeding.

C. Prevalence on the merits in this case appears to be reduced to a correct interpretation of which public forum has precedence when a bank holding company has subsidiaries that include non-banks; however, MCorp is likely to prevail on its claim that the executive's administrative power over bank holding companies is preempted by the bankruptcy power which congress has confided to the judiciary.

D. Neither an interest of the public nor an interest of a group of nonparties will be harmed by this injunctive solution to the regulatory conflict.

4. *Restraint.* It is decreed that:

A. The Board is preliminarily enjoined from prosecuting:

(1) Notice of Charges dated October 19, 1988;

(2) Amended Notice of Charges dated October 26, 1988;

(3) Notice of Charges dated March 30, 1989; and

(4) Second Amended Notice of Charges dated May 24, 1989, issued by the Board to MCorp, and

B. The Board is preliminarily enjoined from enforcing the temporary desist orders issued by the Board to MCorp dated October 19, 1988 and October 26, 1988.

C. The Board may continue its general execution, supervisory, and examination duties of the operations of MCorp and its bank subsidiaries and may continue its central bank

duties as they affect MCorp in common with all other institutions.

D. The Board is enjoined from using its authority over bank holding companies or banks to attempt to effect, directly or indirectly, a reorganization of the MCorp group or its components or to interfere, except through participation in the bankruptcy proceedings, with the restructuring being developed in the bankruptcy proceeding.

E. The restraint of this order is effective against the governors, the Federal Reserve System, its employees, its agents, and those acting in concert with them; however, the restraint does not apply to parallel agencies of the government like the Comptroller of the Currency or the Federal Deposit Insurance Corporation as they may independently pursue their regulatory mandates.

5. *Prospective Board Actions.*

A. The Board shall present proposed new administrative proceedings by it against MCorp or the proposed issuance of new notices of charges or new temporary desist orders to MCorp.

B. If the parties cannot agree that the subject of the new proceeding is within the category of regulation exempted from this injunction, then the proposed action shall be presented to this court to determine whether it is an operational issue for the Board or an asset-structural issue for the bankruptcy court.

6. *Further Proceedings.*

A. Under emergency scheduling, the parties may seek modification of this order after notice to the parties.

B. The trial will not be set until the bankruptcy court has had a reasonable opportunity to address the issues raised by MCorp having subsidiaries banks and non-banks.

C. A status conference is set for:

August 15, 1989
10:00 a.m. Tuesday.

Signed on June 19, 1989, at Houston, Texas, correcting case numbers and descriptions in the "Related Proceedings" section of the judgment rendered on June 2, 1989, and signed June 3, 1989.

/s/ LYNN N. HUGHES

Lynn N. Hughes
United States District Judge

APPENDIX C

In the United States Court of Appeals for the Fifth Circuit

MCORP FINANCIAL, INC., MCORP MGT. and MCORP,
Plaintiffs-Appellees,

and

OFFICIAL CREDITORS' COMMITTEE OF MCORP, MCORP FINANCIAL, INC., AND MCORP MGT.,
Intervenors-Appellees,

v.

BOARD OF GOVERNORS FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA,
Defendant-Appellant.

No. 89-2816.

May 15, 1990.

Appeal from the United States District Court for the Southern District of Texas.

Before GARZA, WILLIAMS and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

The Board of Governors of the Federal Reserve appeals an order of the district court, sitting in bankruptcy, enjoining the Board from pursuing its enforcement actions against MCorp without district court approval. 101 B.R. 483. Because the Board's source of strength proceedings exceed its statutory authority, we remand with instructions to enjoin the Board from further prosecution of these charges. Because the district court lacks subject matter jurisdiction to enjoin the Board's actions on the remaining charges, we vacate the injunction as to these charges.

I.

In October 1988, the Board of Governors of the Federal Reserve (the Board), the primary regulator for bank holding companies, issued a notice of charges and of hearing against MCorp, a Texas-based bank holding company. The Board alleged that MCorp was engaging in unsafe and unsound practices, "likely to cause substantial dissipation of the assets of MCorp that could be used to allow MCorp to serve as a source of financial strength for the subsidiary Banks." A week later the Board issued an Amended Notice of Charges, which sought, among other things, to require MCorp to "implement[ ] an acceptable capital plan that would ensure that all of MCorp's available assets are used to recapitalize the Subsidiary Banks that are suffering capital deficiencies." MCorp's subsidiary banks were suffering heavy losses from real estate and energy loans.

In March 1989, three creditors of MCorp commenced an involuntary bankruptcy proceeding against MCorp in the U.S. Bankruptcy Court for the Southern District of New York. The Comptroller of the Currency (OCC), the primary regulator for national banks, subsequently declared a total of twenty of MCorp's subsidiary banks (MBanks) insolvent; OCC appointed the Federal Deposit Insurance Corporation (FDIC) as receiver, divesting MCorp of control of these banks. MCorp was left with five banks. MCorp and two of its subsidiaries, MCorp Financial and MCorp Management then filed voluntary Chapter 11 bankruptcy petitions in the U.S. Bankruptcy Court for the Southern District of Texas. The bankruptcy proceedings against MCorp and its subsidiaries (hereafter collectively referred to as MCorp) were consolidated into one jointly administered proceeding in the Texas forum.

In March 1989, by notice of charges and hearing the Board also commenced further administrative proceedings against MCorp. The March charges accused MCorp and MCorp management of violations of § 23A of the Federal Reserve Act, alleging MCorp caused MBank Houston and MBank Preston, two of the closed banks, to provide MCorp management "unsecured extensions of credit." In late May the Board issued a

second amended notice of charges, relating to the October notice of charges, alleging that MCorp had failed to act as a source of financial strength to its remaining subsidiary banks.

MCorp initiated an adversary proceeding against the Board in May 1989, and filed an Emergency Motion for a TRO and preliminary injunction, seeking to enjoin the Board from prosecuting its administrative proceedings against the debtors, and from initiating further administrative proceedings against the debtors without prior approval of the bankruptcy court. The bankruptcy court denied the TRO request. The Board moved the district court to withdraw the reference of the adversary proceeding to the bankruptcy court. The district court granted the Board's motion and placed the case on its own docket.

In June 1989, the district court entered a preliminary injunction granting the relief sought by the debtors. The district court preliminarily enjoined the Board from prosecuting its pending administrative proceedings and using

> its authority over bank holding companies or banks to attempt to effect, directly or indirectly, a reorganization of the MCorp group or its components or to interfere, except through participation in the bankruptcy proceedings, with the restructuring being developed in the bankruptcy proceeding.

The district court stated that the preliminary injunction left completely unaffected the Board's "general execution, supervisory and examination duties of the operations of MCorp and its bank subsidiaries and . . . central bank duties as they affect MCorp in common with all other institutions." The court established a procedure for future Board proceedings, where the Board was first required to present to MCorp any new administrative proceedings, notices of charges or temporary cease and desist orders before their issuance. If the Board and MCorp could not agree whether a proposed proceeding was subject to the preliminary injunction, the Board could then present that issue to the district court. If the court decided the Board's proposed action related to the banks' "operations," the court proposed to exempt this action from the restraint of the preliminary injunction; if however

the Board's proposed action affected the reorganization, the district court proposed to stay this action in deference to the bankruptcy court.

The Board appealed the preliminary injunction to this court.

II.

A.

The Board contends first that the district court, sitting in bankruptcy, has no jurisdiction to enjoin the Board's prosecution of its administrative actions, because of 12 U.S.C. § 1818(i) (the Financial Institutions Supervisory Act of 1966 (FISA) as amended), which provides:

> except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

As we stated in *Groos National Bank v. Comptroller of Currency*, 573 F.2d 889 (5th Cir.1978), "section 1818(i) in particular evinces a clear intention that this regulatory process is not to be disturbed by untimely judicial intervention, at least where there is no 'clear departure from statutory authority.' " *Id.* at 895, *quoting Manges v. Camp*, 474 F.2d 97, 99 (5th Cir.1973). Thus, under 12 U.S.C. § 1818(h) and the Administrative Procedure Act (APA), a bank holding company is not ordinarily entitled to judicial review until the Board issues a final order.

MCorp's principal argument that the district court properly exercised subject matter jurisdiction is predicated on 28 U.S.C. §§ 1334(b) and (d). MCorp argues that these sections of the Bankruptcy Code effectively supersede the Board's exclusive jurisdiction under § 1818(i)(1) to prosecute its enforcement actions, and therefore empower the court to enjoin prosecution of those actions. The district court presumably agreed and concluded that § 1818(i) conflicted with §§ 1334(b) and (d) of the Bankruptcy Code.

Section 1334(b) provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The plain language of § 1334(b) does not purport to give the district court exclusive jurisdiction over matters arising under Title 11 to the exclusion of administrative agencies; rather, § 1334(b) grants the district court concurrent jurisdiction over matters that otherwise would lie within the exclusive jurisdiction of another court.

The legislative history of § 1334(b) also supports the view that the section was intended to prevent another court from exercising exclusive jurisdiction over a matter brought within the Bankruptcy Code. The Commission on the Bankruptcy Laws of the United States, quoted at length in the House Judiciary Committee report, stated that "[the] first and most important objection to the present dispensation is the division of labor between the bankruptcy court and other courts." H.R.Rep. No. 595, 95th Cong., 1st Sess. 43 (1977), U.S.Code Cong. & Admin.News 1978, pp. 5787, 6005. Under the prior bankruptcy law, the jurisdiction of the bankruptcy court was limited by the concepts of possession and consent. The House report adopted the reasoning of the Commission that the old law was undesirable because of "the frequent, time-consuming, and expensive litigation of the question whether the bankruptcy court has jurisdiction of a particular proceeding." *Id.* at 45, U.S.Code Cong. & Admin.News 1978, p. 6007. Under the prior jurisdictional scheme, " 'When a "summary" proceeding in the bankruptcy court is appropriate and when a plenary suit is required is one of the most involved and controversial questions in the entire field of bankruptcy,' " the Committee observed. *Id.* at 45, U.S.Code Cong. & Admin.News 1978, p. 6007. We are persuaded therefore that it was this division of jurisdiction between bankruptcy courts and *other courts* which the jurisdictional changes of the new law were intended to address.

MCorp argues that the legislative history explains that § 1334(b) grants bankruptcy courts pervasive jurisdiction over all matters and proceedings that arise in or in connection with bankruptcy cases. Yet the legislative history reflects no intent that the bankruptcy court's jurisdiction supersede the exclusive jurisdiction of an administrative agency, or reinvest the courts with jurisdiction barred by § 1818.

In holding that § 1334 superseded § 1818(i), the district court did not harmonize the two statutes, but effectively repealed § 1818(i), and negated its basic sense and purpose of preventing early interference with administrative proceedings. This interpretation invested the district court, sitting in bankruptcy, with equitable power withheld from every other court by the language of § 1818(i). Implied repeals are highly disfavored, and one statute will not be considered to impliedly repeal another unless there is a "positive repugnancy" between the two. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189-90, 98 S.Ct. 2279, 2299-2300, 57 L.Ed.2d 117 (1978). We find no such irreconcilable conflict here. As the Supreme Court has stated:

> The "plain purpose" of legislation . . . is determined in the first instance with reference to the plain language of the statute itself. Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises.

Board of Governor v. Dimension Financial Corp., 474 U.S. 361, 373-74, 106 S.Ct. 681, 688-89, 88 L.Ed.2d 691 (1986) (citation omitted).

MCorp further contends that courts consistently have held that the phrase in § 1334(b), "[notwithstanding] any act of Congress that confers exclusive jurisdiction on [any other] court," was expressly intended to confer on the bankruptcy courts ju-

risdiction over all matters related to a debtor's Chapter 11 case, including administrative proceedings, citing *In re Casey Corp.*, 46 B.R. 473 (S.D.Ind.1985), and *In re Shelby County Healthcare Services of Al., Inc*, 80 B.R. 555 (N.D.Ga.1987). The district court relied in part upon *Casey* in holding that § 1334 superseded the jurisdictional bar of § 1818(i). These cases are not binding upon this court, however, nor do we find their reasoning persuasive as to title issue before us.

MCorp argues next that the bankruptcy court has exclusive jurisdiction over the Board's enforcement proceeding based on § 1334(d), which provides:

> The district court in which a case under title 11 is commenced or is pending shall have *exclusive* jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate. (emphasis added).

According to MCorp, because the bankruptcy court has exclusive control of MCorp's assets, it necessarily follows from the above section that the Board had no jurisdiction over MCorp. But the Board has not sought control over the property of MCorp's estate in this action, only the opportunity to go forward in its administrative proceedings. Nor at this early stage do we find the Board's enforcement actions to be sham proceedings, brought as a means of controlling the debtor's assets. We therefore do not consider § 1334(d) to grant the district court exclusive jurisdiction here.

MCorp relies on *In re Modern Boats, Inc*, 775 F.2d 619 (5th Cir.1985), and *In re Louisiana Ship Management Inc*, 761 F.2d 1025 (5th Cir.1985), to support its argument. *Louisiana Ship Management* and *Modern Boats* both involved in rem proceedings in admiralty where vessels were under seizure. We held that once a chapter 11 petition was filed, the court where that petition was filed enjoyed exclusive jurisdiction over the vessels subject to a maritime lien and that the admiralty court had no jurisdiction over the property. MCorp's reliance on these cases is misplaced because the Board's proceedings do not directly concern the debtor's property.

MCorp also argues that because the above Bankruptcy Code provisions were enacted after § 1818, and do not exempt bank holding company administrative actions from the comprehensive jurisdiction of the bankruptcy court, Congress must have intended no such exemptions. MCorp contends that this is especially true in view of the express exemption granted banks from recourse to bankruptcy protection in § 109 of the Bankruptcy Code. Absent some clear intention to the contrary, however, a specific statute will not be controlled by a general one regardless of the priority of enactment. *Crawford Fitting Co. v J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987). Congress revealed no intent to supersede the specific jurisdictional bar of § 1818(i) in the legislative history of the Bankruptcy Reform Act, nor in the recently enacted Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub.L. No. 101-73, 103 Stat. 183. We decline to imply any affirmative powers to the bankruptcy court from Congress' failure to act in this area.

In analogous circumstances, several circuits have held that the automatic stay provisions of the Bankruptcy Code in the case of a bankrupt employer do not supersede the anti-injunction provision of the Norris-LaGuardia Act, which precludes courts from enjoining union conduct. In *In Re Crowe & Associates, Inc.*, 713 F.2d 211, 214-16 (6th Cir.1983), the Sixth Circuit concluded that the legislative history of the Bankruptcy Reform Act was silent as to the anti-injunction provisions of the Norris-LaGuardia Act, and this silence was "self-evident proof that Congress never intended to supersede or transcend [the Norris-LaGuardia Act], since we cannot believe that the Norris-LaGuardia Act was to be superseded *sub silentio*." *Id.* at 215, *quoting In re Petrusch*, 667 F.2d 297, 300 (2d Cir.1981); *see also Briggs Transportation Co. v. International Brotherhood of Teamsters*, 739 F.2d 341, 343 (8th Cir.1984) ("the parties have cited us to nothing in the Bankruptcy Code or its legislative history indicating a congressional intent to lift the jurisdictional restrictions of the Norris-LaGuardia Act").

The Board also relies on *Becker's Motor Transportation, Inc. v. Needham's Motor Service, Inc.*, 632 F.2d 242 (3d

Cir.1980), *cert. denied*, 450 U.S. 916, 101 S.Ct. 1358, 67 L.Ed.2d 341 (1981), in which the court held independent statutory provisions barring any suit to restrain the assessment or collection of taxes deprived the bankruptcy court of the authority to enter an injunction against the government's tax collection efforts. In reaching this conclusion the Third Circuit in *Becker's Motor* distinguished *Bostwick v. United States*, 521 F.2d 741 (8th Cir.1975), a tax injunction case relied upon by MCorp and the lower court in which the Eighth Circuit reached the contrary result. The court in *Becker's Motor* concluded that the *Bostwick* court created a judicial exception to the tax anti-injunction statute in contravention of clear congressional intent. *Becker's Motor* 632 F.2d at 246. We agree with the Third Circuit that absent clear congressional intent any argument for permitting the bankruptcy court's jurisdiction to supersede existing anti-injunction legislation should be addressed to Congress, and we will not imply the repeal of such legislation.

For the above reasons, we conclude that the plain language of § 1818(i) deprives the district court of jurisdiction to enjoin the Board's administrative proceedings if the Board's actions do not exceed the authority Congress granted to it. We turn next to MCorp's argument that the Board is exceeding its statutory authority.

B.

MCorp asserts that the Board lacks authority to proceed against banks in FDIC receivership, that the Board's self-dealing charges are a pretext for avoiding the exclusive jurisdiction of the bankruptcy court over MCorp's assets, and that the Board's source of strength policy is without statutory authority.

In *Manges v. Camp*, 474 F.2d 97 (5th Cir.1973), we recognized that the statute at issue here, § 1818, that withdraws the jurisdiction of the court in deference to an agency, is not effective when the agency exceeds its authority under that statute. There is "a very strong court created exception to withdrawal statutes. This exception comes into play when there has been a clear departure from statutory authority, and thereby exposes the offending agency to review of administrative action otherwise

made unreviewable by statute." *Manges*, 474 F.2d at 99. If the Board's proceedings exceed its statutory authority, we may review the Board's action prior to a final order despite the jurisdictional bar of § 1818; if the Board "was not acting within [the] authority granted by Congress, then 12 U.S.C. § 1818(i) could not withdraw jurisdiction." *Manges*, 474 F.2d at 99.

The Supreme Court established this exception in *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). In *Leedom* the Court found district court review proper, despite an express preclusion provision, where the National Labor Relations Board had acted in excess of its delegated powers.

The Court stated in *Leedom* that "[t]his suit is not one to 'review,' in the sense of that term as used in the [National Labor Relations] Act, a decision of the [National Labor Relations] Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers. . . ." *Leedom*, 358 U.S. at 188, 79 S.Ct. at 183. The D.C. Circuit recently characterized the *Leedom* rule as one permitting a court in the face of a withdrawal statute to determine "whether an agency has acted 'in excess of its delegated powers' " and "whether the agency action 'on its face' violated a statute." *Dart v. United States*, 848 F.2d 217, 222 (D.C.Cir.1988). *See Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.*, — U.S. —, 109 S.Ct. 1361, 103 L.Ed.2d 602 (1989); *Breen v. Selective Service Local Board*, 396 U.S. 460, 90 S.Ct. 661, 24 L.Ed.2d 653 (1970); *Oestereich v. Selective Service System Local Board*, 393 U.S. 233, 89 S.Ct. 414, 21 L.Ed.2d 402 (1968). *Cf. Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 680 n. 11, 106 S.Ct. 2133, 2141 n. 11, 90 L.Ed.2d 623 (1986).

MCorp argues that the Board exceeded its authority in three respects because it has no authority to (1) regulate MCorp's relationships with *former* MBanks, now under FDIC receivership, which are the subject of the administrative proceedings; (2) assist the FDIC, as receiver of the closed MBanks, to obtain damages under the pretext of punishing MCorp for violations

of § 23A of the Federal Reserve Act,[1] which concerns self-dealing among holding company subsidiaries; and (3) compel a bank holding company to transfer its funds to subsidiary banks.

MCorp argues first that the Board lacks authority to regulate MCorp's relationships with former subsidiary banks now under FDIC receivership. Both the "source of strength" charges and the self dealing charges, as initially set out by the Board, were levelled in part to the relationship between MCorp and MBanks which were later closed and placed under FDIC receivership. We are persuaded that the Board is at least entitled to make a determination on the legitimacy of the credit transaction with the closed banks at issue to allow it to evaluate what remedy it wants to pursue against MCorp. Certainly the Board's attempt to do that is not facially invalid.

MCorp next argues that the Board's § 23A proceeding is simply an attempt to assist the FDIC to obtain MCorp's property under the guise of remedying a violation of § 23A of the Reserve Act. We disagree. The Board is well within its authority in seeking an order against MCorp to cease and desist any transactions which violate the provisions of § 23A, or "to take affirmative action" as may be appropriate. 12 U.S.C. § 1818(b)(1). The notice of charges relating to the appropriateness of the credit transactions between an MCorp nonbank subsidiary and two of MCorp's former subsidiary banks is not on its face a sham proceeding initiated only to assist the FDIC to collect damages; at least a fact issue is presented on the merits of the § 23A charges. The mere prosecution of the charges before the Board does not in itself disturb the bankruptcy court's alleged exclusive jurisdiction over MCorp's property under § 1334(d).

We are persuaded, however, that a serious legal issue is presented as to whether the Board has statutory authority to

1. Section 23A of the Federal Reserve Act, 12 U.S.C. § 371c, prohibits a bank from extending credit to a nonbank affiliate unless the extension of credit is secured by collateral having a market value of at least 100 percent of the loan. The Board has charged that MCorp violated this requirement by causing two of its former subsidiary banks to extend $63.7 million of unsecured credit to an affiliated subsidiary of MCorp, and failing to make timely repayments to the subsidiary banks that extended the credit.

pursue its source of strength charges. Before turning to that problem, we address a threshold argument of the Board that we are precluded from considering the Board's authority to proceed.

The Board contends that MCorp may not judicially challenge at this stage the Board's authority to proceed with its charges because MCorp has not exhausted its administrative remedies. The Board relies on *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938), in which the Court stated that "[j]udicial relief is not normally available for supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Id.* at 50, 58 S.Ct. at 463.

Myers did not present a challenge to the agency's authority to act on the complaint presented to it. The petitioning employer factually challenged the interstate nature of the employer's business, one of the elements of the NLRB's charge. The Court concluded that this factual determination should be made by the NLRB. The Supreme Court held that a federal district court is without jurisdiction to enjoin the NLRB from "hearing and determining what Congress declared the [National Labor Relations] Board should hear and determine in the first instance." *Id.* at 50-51, 58 S.Ct. at 463-464 (footnote omitted).

The question of the Board's authority to impose its source of strength requirement is quite a different issue. No facts are in dispute. The sole question presented is a legal one: whether the Board has authority to order a holding company to transfer its funds to its troubled subsidiary banks. The Board has instituted proceedings to require the holding company to transfer those funds. The legal issue of the Board's authority can be resolved without further factual development. "[P]rompt resolution will eliminate uncertainty and be in the interest of efficient judicial administration." *Indep. Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1167 (D.C.Cir.1979), *cert. denied*, 449 U.S. 823, 101 S.Ct. 84, 66 L.Ed.2d 26 (1980). Because we conclude that MCorp is not required to exhaust its administrative remedies in this circumstance, we turn to the merits of whether the Board has authority to require the holding company to transfer its funds to troubled subsidiary banks.

The Board contends it has authority to issue the source of strength charges under §§ 1818(b)(1) and (3), which empower it to file charges against a bank holding company which the Board believes (1) has violated or is about to violate a "law, rule or regulation"; or (2) is engaging in an "unsafe or unsound" practice.[2] The Board contends that MCorp has failed to act as a source of strength for its bank subsidiaries in violation of the Board's regulations and policy statements. The Board also contends that this failure constitutes an unsafe or unsound practice in violation of § 1818.[3]

We consider first whether the authority the Board assumed under its regulation and policy statement exceeds its statutory grant. The Bank Holding Company Act of 1956 (BHCA), 12 U.S.C. § 1841 et seq., grants the Board supervisory control over the formation, structure and operation of bank holding companies and their nonbank subsidiaries. Section 3(a) of the Act, 12 U.S.C. § 1842(a), provides that no company may

2. Termination of status as insured depository institution. Section 1818 which is captioned in § (b)(1) and (3):

> (b) Cease-and-desist proceedings
>
> (1) If, in the opinion of the appropriate Federal banking agency, any insured depository institution . . . is engaged or has engaged, or the agency has reasonable cause to believe that the depository institution . . . is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation . . . the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof . . .
>
> (3) This subsection . . . shall apply to any bank holding company, and to any subsidiary (other than a bank) of a bank holding company, as those terms are defined in the Bank Holding Company Act of 1956. . . . Nothing in this subsection or in subsection (c) of this section shall authorize any Federal banking agency, other than the Board of Governors of the Federal Reserve System, to issue a notice of charges or cease-and-desist order against a bank holding company or any subsidiary thereof (other than a bank or subsidiary of that bank).

12 U.S.C. §§ 1818(b)(1) and (3), *amended* by FIRREA, Pub.L. No. 101-73, §§ 901(d), 902(a)(1)(A).

3. Because we conclude that the source of strength proceedings exceed the Board's statutory authority, we need not resolve whether the source of strength charges relating to MCorp's former subsidiary banks are beyond the Board's authority.

acquire control of a bank without prior approval by the Board. In determining whether to approve an application, § 3(c) of the Act, 12 U.S.C. § 1842(c), directs the Board to consider "the financial and managerial resources and future prospects of the company or companies and the banks concerned."[4]

In 1984, as part of its comprehensive revision of Regulation Y, the Board added 12 C.F.R. § 225.4(a)(1), which provides:

> § 225.4 Corporate practices.
>
> (a) *Bank holding company policy and operations.* (1) A bank holding company shall serve as a source of financial and managerial strength to its subsidiary banks and shall not contuct [sic] its operations in an unsafe or unsound manner.

Revision of Regulation Y, 49 Fed.Reg. 820 (1984) (codified at 12 C.F.R. § 225.4(a)(1)).

In April 1987, the Board published a policy statement in the Federal Register, which further provided:

> It is the policy of the Board that in serving as a source of strength to its subsidiary banks, *a bank holding company should stand ready to use available resources to provide adequate capital funds to its subsidiary banks* during periods of financial stress or adversity and should maintain the financial flexibility and capital-raising capacity to obtain additional resources for assisting its subsidiary banks. . . .
>
> A bank holding company's failure to meet its obligation to serve as a source of strength to its subsidiary bank(s), including an unwillingness to provide appropriate assistance to a troubled

4. Section 1842 states in relevant part: Acquisition of bank shares or assets

* * *

(c) Factors governing determination of application for approval. . .

In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

> or failing bank, will generally be considered an unsafe and unsound banking practice or a violation of Regulation Y, or both. . . .

Policy Statement, 52 Fed.Reg. 15707, 15708 (1987) (emphasis added). This policy statement was effective April 24, 1987. The Board solicited comments on the policy, with a view to revising the statement in light of such comments. No subsequent revision has been published.

The Board also relies on the broad language of § 5(b) of the BHCA, 12 U.S.C. § 1844(b), for authority to issue the above regulation and policy statement. Section 5(b) states:

> The Board is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof.

The Board finds support for its authority to enforce its source of strength requirements in *Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 99 S.Ct 505, 58 L.Ed.2d 484 (1978). In this case the Court considered whether the BHCA authorized the Board to disapprove an application of a proposed bank holding company solely on grounds of financial unsoundness, and in the absence of any anticompetitive effects resulting from the transaction. The Supreme Court answered this question in the affirmative and upheld the Board's rejection of a proposed holding company's application. This holding was based on the statutory language of 12 U.S.C. § 1842(c), as well as the legislative history of the BHCA. The Supreme Court stated:

> The language of the statute supports the Board's interpretation of § 3(c) as an authorization to deny applications on grounds of financial and managerial unsoundness even in the absence of any anticompetitive impact. Section 3(c) directs the Board to consider the financial and managerial resources and future prospects of the applicants and banks concerned [i]n every case," not just in cases in which the Board finds that the transaction will have an anticompetitive effect.

Id. at 243, 99 S.Ct. at 510.

In response to the court of appeals' holding that the Board's authority to deny an application because of unsound financial or managerial consideration was limited to instances in which the unsoundness was caused or exacerbated by the proposed transaction, the Court stated:

> Indeed, the Court of Appeals' construction of the statute would require the Board to approve formation of a bank holding company with corrupt management simply because management would become no more corrupt by virtue of the transaction. We hesitate to adopt a construction that would yield such an anomalous result.

Id. at 250, 99 S.Ct. at 514.

Finally, addressing the arguments of the dissent, the Court stated that its holding was not intended to extend the Board's authority to day-to-day supervision of banks, but allowed the Board to disapprove an application to prevent the formation of an unsound holding company.

> In the dissent's view, the Board, by looking beyond the transaction before it, attempted to exercise the day-to-day regulatory authority over banks which Congress denied to it and conferred on the Comptroller. We disagree with the basic premise of the dissent's argument. As the Board found, the *effect* of this transaction would have been the formation of a financially unsound bank holding company. Thus, the Board's attempt to prevent this effect and to induce respondent to form an enterprise that met the Board's standards of financial soundness was entirely consistent with the language the dissent cites.

Id. at 252 n. 18, 99 S.Ct at 515 n. 18 (emphasis added). In *First Lincolnwood*, therefore, the Court relied upon the express provisions of § 3(c) that required the Board to consider financial soundness of the subsidiary bank in determining whether to approve a holding company's application. The Court made it clear that it did not read the BHCA to grant the Board authority to regulate the day-to-day financial soundness of the subsidiary banks.

The Supreme Court in *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 106 S.Ct. 681, 88 L.Ed.2d 691 (1986), considered whether the Board exceeded its authority in expanding certain definitions in Regulation Y. The Board, as part of Regulation Y, included institutions that were not banks within the Board's regulatory ambit. The Court concluded that the Board had exceeded its authority in attempting to regulate the "nonbank banks."

The Court found that the BHCA "vests broad regulatory authority in the Board over bank holding companies' to restrain ...e undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit.' " *Id.* at 365, 106 S.Ct. at 684, *quoting* S.Rep. No. 91-1084 (1970), U.S.Code Cong. & Admin.News 1970, p. 5541. The Board's new definitions did not fall within the plain purposes of the BHCA, the Court concluded. The Court added that "§ 5 only permits the Board to police within the boundaries of the Act. . . ." *Id.* at 373 n. 6, 106 S.Ct. at 688 n. 6.

First Lincolnwood and *Dimension Financial* together teach that the primary purposes of the BHCA are to prevent the concentration of control of banking resources, and to separate banking from nonbanking enterprises. *First Lincolnwood* is narrowly written and expressly limits the Board's authority to consider financial and managerial soundness of subsidiary banks to the Board's decision to grant or deny a holding company's application. Section 3(c) of the BHCA specifically grants this authority to the Board. The BHCA does not grant the Board authority to consider the financial and managerial soundness of the subsidiary banks after it approves the application, and *First Lincolnwood* finds this regulatory authority lacking in the day-to-day operations of a subsidiary bank. For these reasons, we conclude that the Board is without authority under the BHCA to require MBank to transfer its funds to its troubled subsidiary bank.[5]

5. As a condition to approving an application, the Board could possibly require the holding company to agree to maintain the subsidiary banks to some degree of financial soundness. The Federal Home Loan Bank Board (FHLBB) has long followed this practice in approving saving and loan holding company applications;

The Board asserts as an independent basis for its source of strength regulation, policy statement and enforcement proceedings its broad authority under § 1818(b)(1) and (3) of FISA to order a holding company to cease and desist from any activity that, in the Board's judgment, constitutes an unsafe or unsound practice. The Board argues that MCorp's failure to provide capital to its subsidiary banks is an unsafe or unsound practice which the Board may act to restrain under § 1818.

In determining whether we should accept the Board's interpretation of a statute the Board is charged with enforcing, we look to the test established by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

> If Congress has spoken clearly to the issue presented in a case, that intent controls. 467 U.S. at 844 [104 S.Ct at 2782]. If the agency's interpretation is contrary to the clear intent of Congress, the agency's interpretation is invalid. If, on the other hand, Congress had no clear intent as to the particular question at issue, the courts may invalidate the agency's interpretation only if it is "unreasonable" or "impermissible." *Id.*

Investment Co. Institute v. Federal Deposit Ins. Corp., 815 F.2d 1540, 1546 (D.C. Cir.), *cert. denied*, 484 U.S. 847, 108 S.Ct. 143, 98 L.Ed.2d 99 (1987). *See also American Insurance Assoc. v. Clarke*, 865 F.2d 278, 280-81 (D.C.Cir.1988).

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in 1981, we approved the practice in *Kaneb Services, Inc. v. Federal Sav. & Loan Ins. Corp.*, 650 F.2d 78 (5th Cir.1981). The statutory authority of the FHLBB to regulate savings and loan holding companies is practically identical to the authority granted the Board to regulate bank holding companies. *See* 12 U.S.C. §§ 1730(e)(1) and (3), 1730(e)(2); Regulatory Capital Maintenance Obligations of Acquirers of Insured Institutions, 53 Fed.Reg. 31761 (1988); Acquisition of Control of Insured Institutions, 54 Fed.Reg. 32959 (1989) (to be codified at 12 C.F.R § 574.7(a)(2) and (3)). The Office of Thrift Supervision, the successor to the FHLBB as primary regulator of saving and loan holding companies after FIRREA, continues this practice in its current regulations. *See* Transfer and Recodification of Regulations Pursuant to Financial Institutions Reform, Recovery and Enforcement Act, 54 Fed.Reg. 49411 (1989).

The Congress has not spoken clearly to what constitutes an unsafe or unsound practice, leaving the development of the phrase to the regulatory agencies. As we stated in *Groos Nat'l Bank v. Comptroller of Currency*, 573 F.2d 889, 897 (5th Cir. 1978), "[t]he phrase 'unsafe or unsound banking practice' is widely used in the regulatory statutes and in case law, and one of the purposes of the banking acts is clearly to commit the progressive definition and eradication of such practices to the expertise of the appropriate regulatory agencies." Thus, under the *Chevron* analysis, in the absence of clear congressional intent on the meaning of this language, we must examine the "reasonableness" and "permissibility" of the Board's interpretation that the failure of the holding company to inject capital into subsidiary banks is an "unsafe or unsound" practice.

In *Gulf Federal Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 651 F.2d. 259 (5th Cir.1981), *cert. denied*, 458 U.S. 1121, 102 S.Ct. 3509, 73 L.Ed.2d 1383 (1982), the Federal Home Loan Bank Board found that Gulf Federal's contracting practice was an "unsafe or unsound" practice within the meaning of § 1818. We disagreed and concluded that the FHLBB's finding that Gulf Federal's use of inconsistent contract terms was an unsafe or unsound practice was not a reasonable interpretation of the "unsafe or unsound practice" provision.

We also noted in *Gulf Federal* that the "unsafe or unsound practice" provision was the subject of lively congressional debate at the time the statute was enacted. We observed that the authoritative definition of an unsafe or unsound practice, adopted in both Houses, was that:

> Generally speaking, an "unsafe or unsound practice" embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds.

Id. at 264, *quoting* 112 Cong.Rec. 26474 (1966). *See* 112 Cong. Rec. 24984, 26474 (1966).

Enforcement of the Board's source of strength regulation requiring MCorp to transfer MCorp's funds to the troubled subsidiary banks can hardly be considered a "generally accepted standard[ ] of prudent operation." Such a transfer of funds would require MCorp to disregard its own corporation's separate status; it would amount to a wasting of the holding company's assets in violation of its duty to its shareholders. Also, one of the fundamental purposes of the BHCA is to separate banking from commercial enterprises. That purpose is obviously not served if the Board is permitted to treat a holding company as merely an extension of its subsidiary bank.

Congress first under the BHCA in 1956 and later in amendments to the Federal Reserve Act in 1966 has generally defined with specificity the dealings between subsidiary banks and nonbank affiliates, including holding companies, it considered unsafe and unsound. *See* Bank Holding Company Act of 1956, c. 240, § 6, 70 Stat. 137, *repealed by* Pub.L. No. 89-485, § 9, 80 Stat. 240 (1966); Pub.L. No. 89-485, § 12(a) (amending 12 U.S.C. § 371c). *See also* S.Rep. No. 1179, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.Code Cong. & Admin.News 2394-96. Congress made no effort in any of this legislation to require holding companies to make capital injections into subsidiary banks as part of these safeguards. Congress noted only that the provision enacted as part of the BHCA "does not prohibit the borrowing of funds by any subsidiary in the system from the parent bank holding company." S.Rep. No. 1095, 84th Cong., 1st Sess., *reprinted in* 1956 U.S.Code Cong. & Admin.News 2482, 2496. In sum, Congress set forth detailed limits on transactions considered unsound between subsidiary banks and holding companies, without mentioning the infusion of capital by holding companies into subsidiaries. This strongly supports MCorp's argument that Congress never intended to grant authority to the Board to require a holding company to inject capital into subsidiary banks as a safeguard against "unsafe or unsound" practices.

This is consistent with the conclusion reached by the Shadow Financial Regulatory Committee,[6] responding to the Board's

6. Formed in February 1986, the Shadow Financial Regulatory Committee (SFRC) meets periodically to monitor regulations of the financial services industry. The SFRC is composed of economists, academics and former financial regulators.

source of strength policy. The Committee stated that, "while Congress has empowered regulators of banks to issue capital directives to institutions in their charge, it has not authorized the Fed to issue capital directives to bank holding companies." 48 Banking Rep. (BNA) No. 21, at 923 (May 25, 1987).

Thus, we conclude that the Board's determination that the holding company's failure to transfer its assets to a troubled subsidiary was an "unsafe or unsound practice" under §§ 1818(b)(1) and (3) is an unreasonable and impermissible interpretation of that term.

It is not our role to pass judgment on the wisdom of the scheme Congress put in place to regulate bank holding companies. Similarly, the Board cannot exceed the authority Congress granted to it to correct perceived flaws in the congressional scheme. As the Supreme Court stated in *Dimension Financial:*

> The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.
>
> If the Bank Holding Company Act falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the Courts, to address.

474 U.S. at 374, 106 S.Ct. at 688-689 (footnote omitted).[7]

7. The Board also asserts on appeal that its administrative proceedings are exempt from both the Bankruptcy Code's automatic stay provision, 11 U.S.C. § 362(b), and the general equitable power of the bankruptcy court under § 105 of the Code. Because we find that the district court, sitting in bankruptcy, lacks jurisdiction over the Board's ongoing enforcement actions we need not address MCorp's argument that the Bankruptcy Code's stay provisions prevent the Board from proceeding.

III.

Because we find that the Board's source of strength proceedings exceed its statutory authority, we remand this case to the district court with instructions to enjoin the Board from further prosecution of this charge. The remaining preliminary injunction entered by the district court is vacated because it lacked subject matter jurisdiction to interfere with the Board's § 23A proceedings.

REVERSED, VACATED and REMANDED.

APPENDIX D

In the United States Court of Appeals for the Fifth Circuit

MCORP FINANCIAL, INC., MCORP MGT. and MCORP,
Plaintiffs-Appellees,

and

OFFICIAL CREDITORS' COMMITTEE OF MCORP, MCORP FINANCIAL, INC., AND MCORP MGT.,
Intervenors-Appellees,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA,
Defendant-Appellant.

No. 89-2816.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

August 6, 1990

Before GARZA, WILLIAMS and DAVIS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the Suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ W. EUGENE DAVIS

W. Eugene Davis
United States Circuit Judge

APPENDIX E

Statutes Involved

TITLE 11, SECTION 105 OF THE UNITED STATES CODE

POWER OF COURT

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

TITLE 11, SECTION 362 OF THE UNITED STATES CODE

AUTOMATIC STAY

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, admin-

istrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, or a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of a case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay –

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment as defined in section 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or

in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; or

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of the title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction,

held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively), or under applicable State law; or

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively).

The provisions of paragraph (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section –

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of –

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay –

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if –

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay or any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The Court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section –

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

TITLE 12, SECTION 1818 OF THE UNITED STATES CODE (1988)

TERMINATION OF STATUS AS INSURED BANK

* * *

(b) Cease-and-desist proceedings

(1) If, in the opinion of the appropriate Federal banking agency, any insured bank, bank which has insured deposits, or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such a bank is engaging or has engaged, or the agency has reasonable cause to believe that the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is about to engage, in an unsafe or unsound practice in conducting the business of such bank, or is violating or has violated, or the agency has reasonable cause to believe that the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the bank or any written agreement entered into with the agency, the agency may issue and serve upon the bank or such director, officer, employee, agent, or other person

a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the bank or the director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the bank or the director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the bank or its directors, officers, employees, agents, and other persons participating in the conduct of the affairs of such bank to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the bank or other person concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(3) This subsection and subsections (c) through (f) and (h) through (n) of this section shall apply to any bank holding company, and to any subsidiary (other than a bank) of a bank

holding company, as those terms are defined in the Bank Holding Company Act of 1956 [12 U.S.C. 1841 et seq.], and to any organization organized and operated under section 25(a) of the Federal Reserve Act [12 U.S.C. 611 et seq.] or operating under section 25 of the Federal Reserve Act [12 U.S.C. 601 et seq.], in the same manner as they apply to a State member insured bank. Nothing in this subsection or in subsection (c) of this section shall authorize any Federal banking agency, other than the Board of Governors of the Federal Reserve System, to issue a notice of charges or cease-and-desist order against a bank holding company or any subsidiary thereof (other than a bank or subsidiary of that bank).

(4) This subsection and subsections (c), (d), (h), (i), (k), (*l*), (m), and (n) of this section shall apply to any foreign bank or company to which subsection (a) of section 3106 of this title applies and to any subsidiary (other than a bank) of any such foreign bank or company in the same manner as they apply to a bank holding company and any subsidiary thereof (other than a bank) under subparagraph (3) of this subsection. For the purposes of this paragraph, the term "subsidiary" shall have the meaning assigned to it in section 2 of the Bank Holding Company Act of 1956 [12 U.S.C. 1841].

(5) This section shall apply, in the same manner as it applies to any insured bank for which the appropriate Federal banking agency is the Comptroller of the Currency, to any national banking association chartered by the Comptroller of the Currency, including an uninsured association.

(c) Temporary cease-and-desist orders

(1) Whenever the appropriate Federal banking agency shall determine that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the notice of charges served upon the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank pursuant to paragraph (1) of subsection (b) of this section, or the continuation thereof, is likely to cause insolvency or substantial dissipation of assets or earnings of the bank, or is likely to seriously weaken the condition of the bank or otherwise

seriously prejudice the interests of its depositors prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (b) of this section, the agency may issue a temporary order requiring the bank or such director, officer, employee, agent, or other person to cease and desist from any such violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings. Such order shall become effective upon service upon the bank or such director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2) of this subsection, shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the agency shall dismiss the charges specified in such notice, or if a cease-and-desist order is issued against the bank or such director, officer, employee, agent, or other person, until the effective date of such order.

(2) Within ten days after the bank concerned or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank has been served with a temporary cease-and-desist order, the bank or such director, officer, employee, agent, or other person may apply to the United States district court for the judicial district in which the home office of the bank is located, or the United States District Court for the District of Columbia, for an injuction[4] setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the bank or such director, officer, employee, agent, or other person under paragraph (1) of subsection (b) of this section, and such court shall have jurisdiction to issue such injunction.

(d) Temporary cease-and-desist orders; enforcement

In the case of violation or threatened violation of, or failure to obey, a temporary cease-and-desist order issued pursuant to

4. So in original. Probably should be "injunction".

paragraph (1) of subsection (c) of this section, the appropriate Federal banking agency may apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the bank is located, for an injunction to enforce such order, and, if the court shall determine that there has been such violation or threatened violation or failure to obey, it shall be the duty of the court to issue such injunction.

* * *

(h) Hearings and judicial review

(1) Any hearing provided for in this section (other than the hearing provided for in subsection (g)(3) of this section) shall be held in the Federal judicial district or in the territory in which the home office of the bank in located unless the party afforded the hearing consents to another place, and shall be conducted in accordance with the provisions of chapter 5 of title 5. Such hearing shall be private, unless the appropriate Federal banking agency, in its discretion, after fully considering the views of the party afforded the hearing, determines that a public hearing is necessary to protect the public interest. After such hearing, and within ninety days after the appropriate Federal banking agency or Board of Governors of the Federal Reserve System has notified the parties that the case has been submitted to it for final decision, it shall render its decision (which shall include findings of fact upon which its decision is predicated) and shall issue and serve upon each party to the proceeding an order or orders consistent with the provisions of this section. Judicial review of any such order shall be exclusively as provided in this subsection (h). Unless a petition for review is timely filed in a court of appeals of the United States, as hereinafter provided in paragraph (2) of this subsection, and thereafter until the record in the proceeding has been filed as so provided, the issuing agency may at any time, upon such notice and in such manner as it shall deem proper, modify, terminate, or set aside any such order. Upon such filing of the record, the agency may modify, terminate, or set aside any such order with permission of the court.

(2) Any party to the proceeding, or any person required by an order issued under this section to cease and desist from any of the violations or practices stated therein, may obtain a review of any order served pursuant to paragraph (1) of this subsection (other than an order issued with the consent of the bank or the director or officer or other person concerned, or an order issued under paragraph (1) of subsection (g) of this section) by the filing in the court of appeals of the United States for the circuit in which the home office of the bank is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the agency be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the agency, and thereupon the agency shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall except as provided in the last sentence of said paragraph (1) be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the agency. Review of such proceedings shall be had as provided in chapter 7 of title 5. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28.

(3) The commencement of proceedings for judicial review under paragraph (2) of this subsection shall not, unless specifically ordered by the court, operate as a stay of any order issued by the agency.

(i) Jurisdiction and enforcement; penalty

(1) The appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the bank is located, for the enforcement of any effective and outstanding notice or order issued under this section, and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section no court shall have jurisdiction to affect

by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

(2)(i) Any insured bank which violates or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such a bank who violates the terms of any order which has become final and was issued Pursuant to subsection (b), (c), or (s) of this section, shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues: *Provided*, That the agency having authority to impose a civil money penalty may, in its discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under such authority. The penalty may be assessed and collected by the appropriate Federal banking agency by written notice. As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(ii) In determining the amount of the penalty the appropriate Federal banking agency shall take into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the insured bank or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.

(iii) The insured bank or person assessed shall be afforded an opportunity for agency hearing, upon request made within ten days after issuance of the notice of assessment. In such hearing all issues shall be determined on the record pursuant to section 554 of title 5. The agency determination shall be made by final order which may be reviewed only as provided in subparagraph (iv). If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(iv) Any insured bank or person against whom an order imposing a civil money penalty has been entered after agency hearing under this section may obtain review by the United States court of appeals for the circuit in which the home office

of the insured bank is located, or the United States Court of Appeals for the District of Columbia Circuit, by filing a notice of appeal in such court within twenty days from the service of such order, and simultaneously sending a copy of such notice by registered or certified mail to the appropriate Federal banking agency. The agency shall promptly certify and file in such Court the record upon which the penalty was imposed, as provided in section 2112 of title 28. The findings of the agency shall be set aside if found to be unsupported by substantial evidence as provided by section 706(2)(E) of title 5.

(v) If any insured bank or person fails to pay an assessment after it has become a final and unappealable order, or after the court of appeals has entered final judgment in favor of the agency, the agency shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court. In such action, the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(vi) Each Federal banking agency shall promulgate regulations establishing procedures necessary to implement this paragraph.

(vii) All penalties collected under authority of this section shall be covered into the Treasury of the United States.

(j) Penalties

Any director or officer, or former director or officer of an insured bank, or any other person, against whom there is outstanding and effective any notice or order (which is an order which has become final) served upon such director, officer, or other person under subsections (e)(4), (e)(5), or (g) of this section, and who (i) participates in any manner in the conduct of the affairs of the bank involved, or directly or indirectly solicits or procures, or transfers or attempts to transfer, or votes or attempts to vote, any proxies, consents, or authorizations in respect of any voting rights in such bank, or (ii) without the prior written approval of the appropriate Federal banking agency, votes for a director, serves or acts as a director, officer, or employee of any bank, shall upon conviction be fined not more than $5,000 or imprisoned for not more than one year, or both.

(k) Definitions

As used in this section (1) the terms "cease-and-desist order which has become final" and "order which has become final" mean a cease-and-desist order, or an order, issued by the appropriate Federal banking agency with the consent of the bank or the director or officer or other person concerned, or with respect to which no petition for review of the action of the agency has been filed and perfected in a court of appeals as specified in paragraph (2) of subsection (h) of this section, or with respect to which the action of the court in which said petition is so filed is not subject to further review by the Supreme Court of the United States in proceedings provided for in said paragraph, or an order issued under paragraph (1) or (3) of subsection (g) of this section, and (2) the term "violation" includes without limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

* * *

TITLE 28, SECTION 1334 OF THE UNITED STATES CODE

BANKRUPTCY CASES AND PROCEEDINGS

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In re:	)	
	)	NO. CIV 89-1231 PHX-RMB
AMERICAN	)	
CONTINENTAL CORP.,	)	B-89-3117 PHX-SSC
an Ohio corporation,	)	
	)	
Debtors.	)	
	)	

On April 13, 1989, eleven wholly-owned subsidiaries of Lincoln Savings and Loan Association (subsidiaries) filed bankruptcy petitions pursuant to Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.*: Crescent Lending Corporation, AMCOR Funding Corporation, Phoenician Financial Corporation, Phoenician Commercial Properties, Inc., LINFIN Corporation, CRESFIN Corporation, SSFLC, AMCOR Investments Corporation, Provident Mortgage Corporation, Castle Meadows, Inc., and The Crescent Hotel Group. On April 14, 1989, the Federal Home Loan Bank Board (FHLBB) placed Lincoln Savings and Loan Association ("Old Lincoln") into conservatorship, appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as conservator, and named the Federal Deposit Insurance Corporation (FDIC) as FSLIC's managing agent. On April 17, 1989, FSLIC voted its 100% stock ownership in each subsidiary to establish new boards of directors, which in turn installed new management teams. On August 3, 1989, the FHLBB placed Old Lincoln into receivership, and conveyed its assets and liabilities to a newly chartered savings and loan association, identified herein as "New Lincoln." On August 9, 1989, the Resolution Trust Corporation (RTC) succeeded FSLIC as receiver of Old Lincoln and as conservator of New Lincoln, pursuant to the newly enacted Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA).

RTC, as conservator for New Lincoln, now moves for dismissal of the subsidiaries' bankruptcy cases because of what it describes as "pervasive conflicts" between Title 11, the United States Bankruptcy Code, and Title 12, the United States Code on Banks and Banking, as recently amended by FIRREA. RTC contends that bankruptcy proceedings will conflict irreconcilably with its statutory mandate, set forth in 12 U.S.C. § 1821(d)(2)(B); (D), and (I) as amended by § 212(a) of FIRREA, to "take any action appropriate to carry on the business of the institution and preserve and conserve [its] assets and property," to "exercise all powers and authorities of a federal conservator," and to take any authorized actions which it "determines is in the best interests of the depository institution, its depositors, or the Corporation." RTC claims that, pursuant to these provisions , "the Bankruptcy Code may not affect in any manner its management of the Lincoln Subsidiaries," including dissolution of the subsidiaries or consolidation of their assets.

At the outset, the Court regards two matters as particularly significant. First, the Lincoln subsidiaries are not financial institutions, but rather are separate corporations which are proper debtors pursuant to 11 U.S.C. § 109. Second, while RTC is the conservator for New Lincoln, it is not the conservator for the subsidiaries. It is as a result of New Lincoln's status as shareholder that RTC may direct the operations of the subsidiaries under applicable state law.

Moreover, it is pivotal that FIRREA neither deprives the District Court of jurisdiction over RTC nor expressly nullifies or supplants any portion of Title 11. Congress could have specifically preempted application of Chapter 11 as to the subsidiaries of depository institutions regulated by Title 12, but it did not do so. Among the Congressionally-stated purposes of FIRREA are to "improve the supervision of savings associations," "to contain, manage and resolve failed savings associations," and "to provide funds to deal with failed depository institutions." Throughout, FIRREA prescribes the government's duties and powers with respect to financial institutions. Furthermore, 11 U.S.C. § 109 enumerates those entities which are precluded

from seeking protection under the Bankruptcy Code. Subsidiaries of financial institutions are not among them.

RTC relies heavily upon Section 212 (j) of FIRREA, amending 12 U.S.C. § 1821, which provides:

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

This language is not new to FIRREA. It was present in the Home Owners' Loan Act at 12 U.S.C. § 1464(d)(6)(C) and was interpreted by the Supreme Court in *Coit Independent Joint Venture v. FSLIC*, 109 St.Ct. 1361 (1989). The Court concluded: "When read in its statutory context, this provision prohibits untimely challenges to the receiver's appointment or collateral attacks attempting to restrain the receiver from carrying out its basic functions." Although *Coit* dealt with a receivership, the general principle enunciated is no less applicable to a conservatorship. The legislative history accompanying FIRREA indicates Congressional intent to codify the *Coit* doctrine. The House Banking, Finance and Urban Affairs Committee states in House Report No. 101-54(I) concerning Section 212(j): "[T]he subsection bars courts, to the same extent as the Home Owners' Loan Act does now under existing law, from restraining or affecting the exercise of the powers or functions of the FDIC as conservator or receiver ..." The Committee referred explicitly to the *Coit* decision in House Report No. 101-54(V) when, in discussion of new procedures for claims determination, it stated: "The Judiciary Committee amended this subsection both to clarify its provisions and to ensure that it comports with Supreme Court requirements for adjudication of claims as established in *Colt Independence Joint Venture v. FSLIC* [sic]." It appears, therefore, that FIRREA does not nullify *Coit*, but rather incorporates its general premise and addresses the specific issue raised in that decision.

The crux of RTC's argument is that the Lincoln subsidiaries are "assets"of New Lincoln, and are therefore enveloped in the

net cast by FIRREA. For example, FIRREA authorizes RTC to "take over the assets of and operate the insured depository institution" and to "preserve and conserve the assets and property of such institution." 12 U.S.C. § 1821(d)(2)(B)(i)(iv) as amended by § 212(a) in FIRREA. Thus, RTC urges the Court to repudiate the application of Chapter 11 to the subsidiaries by means of an expansive construction of the terms "assets." Such an interpretation would be severely strained, however, in the absence of an expression by Congress that it intended this result. Repeals by implication of a later-enacted statute are generally disfavored. "Where two statutes are involved, legislative intent to repeal an earlier statute must be clear and manifest. In the absence of such intent, apparently conflicting statutes must be read to give effect to each if such can be done by preserving their sense and purpose." *Blackfeet Indian Tribe v. Montana Power Co.*, 838 F.2d 1055, 1058 (9th Cir. 1988).

The Court concludes that, in the absence of a clear Congressional directive to repeal Chapter 11 as to the non-banking subsidiaries of financial institutions, the Court must endeavour to reconcile Title 12 with Title 11. The Court finds that the two Titles are both compatible and complementary. RTC's *basic functions* as conservator or receiver are not affected or restrained by Chapter 11 supervision of the *subsidiaries*, as to which RTC is not the designated conservator, but rather exercises powers of a shareholder pursuant to state law. Moreover, Chapter 11 administration will help to ensure an orderly resolution of this massive and complex controversy. It will also provide a measure of protection for the interests of subsidiary debtor estates and their creditors, as nothing in FIRREA suggests that these important interests, sought to be protected by the Bankruptcy Code, are to be either disregarded or embraced by the general language of FIRREA. To the extent that conflicts between Title 12 and Title 11 arise, the District Court may hear and resolve them. 28 U.S.C. § 157(d).

It is clear that RTC may at some future time move for dismissal pursuant to 11 U.S.C. § 305(a) (1) by attempting to demonstrate the existence of the statutory requirements that "the interests of creditors and the debtor would be better served by

such dismissal ..." Such motions would, however, present fact-intensive questions not now before the Court.

IT IS THEREFORE ORDERED that RTC's Motion to Dismiss the Bankruptcy Cases of the Lincoln Subsidiary Debtors is DENIED without prejudice.

DATED this 30th day of October 1989.

/s/ RICHARD M. BILBY

Richard M. Bilby
United States District Judge